92-1148

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MICHAEL BARKLEY,

Petitioner,

vs.

RKO PICTURES, INC., a corporation,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Oklahoma

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari filed by Petitioner Michael Barkley ("Barkley"):

1. Whether the full faith and credit clause, Art. IV § 1, of the United States Constitution and 28 U.S.C. § 1738 renders the issue of actual notice of a proceeding immaterial.

2. Whether the full faith and credit clause, Art. IV § 1, of the United States Constitution and 28 U.S.C. § 1738: (a) precludes inquiry into whether constructive service of process resulted in actual notice of proceedings; and (b) requires an Oklahoma Court to give greater preclusive effect to a default judgment than the judgment is entitled in the state of rendition.

3. Whether the Oklahoma Court of Appeals violated Barkley's Fourteenth Amendment Due Process rights by holding that the question of actual notice of a California proceeding was immaterial when the proceeding resulted in a default judgment of over $700,000.00.

4. Whether a Court can base the due process right to notice of proceedings upon the level of sophistication of a defendant.

5. Whether granting greater preclusive effect to a judgment of a sister state than the judgment would be entitled in the state of rendition violates due process rights conferred under the Fourteenth Amendment to the United States Constitution.

RULE 29.1 STATEMENT

Petitioner, Michael Barkley, is an individual to whom Rule 29.1 does not apply.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Barkley respectfully requests a writ of certiorari to review the incorrect judgment of the Oklahoma Court of Appeals.

OPINIONS BELOW

The order of the District Court in and for Tulsa County, Oklahoma is unreported. [App., *infra*, A1-A3]. The opinion of the Oklahoma Court of Appeals [App., *infra*, B1-B7] RKO Pictures, Inc. v. Michael Barkley, et al., No. 75, 649 was published in the Oklahoma Bar Journal, Volume 63 No. 41, 11/7/92 and is to be reported at 838 P.2d 518 (Okl.App. 1992).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The opinion of the Court of Appeals of Oklahoma was entered on February 25, 1992. A timely petition for rehearing was denied by the Court of Appeals of Oklahoma on April 7, 1992 [App., *infra*, C]. A timely petition for writ of certiorari was denied by the Supreme Court of Oklahoma on October 1, 1992. [App., *infra*, D].

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> " . . . nor shall any state deprive any person of life, liberty or property without due process of law . . . "

2. **Article IV Section 1 of the United States Constitution** provides, in relevant part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

3. **28 U.S.C. § 1738** provides:

> **§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit**
>
> The Acts of the legislature of any State, Territory, or Possession of the United States or copies thereof, shall be authenticated by affixing the seal of the State, Territory of Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the Court annexed if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, **shall have the same full faith and credit in a court** within the United States and its Territories and Possessions **as they have by law or of usage in the courts of such State, Territory or Possession from which they are taken.** [emphasis supplied].

4. **California Code of Civil Procedure § 416.90.**

> **§ 416.90 Persons not otherwise specified.**
>
> A summons may be served on a person not otherwise specified in this article by delivering a

copy of the summons and of the complaint to such person or to a person authorized by him to receive service of process.

5. **California Code of Civil Procedure § 473.5.**

§ 473.5. Motion to set aside default and for leave to defend action.

(a) When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action. . . .

* * *

(c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action.

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner is Michael Barkley ("Barkley"). Respondent is RKO Pictures, Inc. ("RKO").[1]

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[1] During the Oklahoma proceedings RKO changed its name to Entertainment Acquisition Corp.

B. BACKGROUND

1. The Agreement

In 1985 Barkley and several other investors entered into an agreement with RKO to invest in the distribution of the motion picture "Plenty" (the "Agreement") [App., *infra*, E1-E7]. Under the Agreement, the investors were to either share in profits from distribution or cover any shortfall in revenues.

Under Paragraph 15(f) the parties agreed that:

> "(f) all notices, payments and other communications hereunder shall be in writing and shall be delivered personally or deposited in the United States mail, postage prepaid, addressed as follows: If to the Investor, To Michael R. Lombardi, as Trustee for RKO "Plenty" Syndicate, c/o Pacific Capital Investors, 1148 Fourth Street, Santa Monica, California 90403, with a courtesy copy to O'Melveny & Myers, 1800 Century Park East, Los Angeles, California 90067, Attn: Gregory Paul, Esq. . . . any notice so addressed and sent by mail shall be deemed to have been given when mailed. [App., *infra*, E4].

Under Paragraph 15(g) of the Agreement, the parties agreed to resolve any disputes through arbitration conducted by an arbitrator familiar with the motion picture industry.

Under Paragraph 15(k), Barkley and the other investors agreed to submit to the exclusive jurisdiction of the State of California for the resolution of any disputes arising under the Agreement. Further, the investors appointed an agent to accept service of process in connection with any matter arising under the Agreement.

The Agreement *did not* contain any waiver of actual notice of proceedings or an agreement that service of process was deemed to be completed when mailed.

2. The California Judgment.

The movie "Plenty" was purportedly unsuccessful and pursuant to the terms of the Agreement, RKO sought to obtain reimbursement from Barkley and the other investors. Initially, RKO's counsel contacted Barkley personally by correspondence to notify him of RKO's intent to seek compensation from the investors. By letter dated January 7, 1987, Barkley specifically requested RKO's counsel to provide additional information to enable Barkley to make an informed decision about the dispute. [App., *infra*, F]. However, counsel for RKO never responded to Barkley's written request.

On June 18, 1987 RKO filed a civil action in Superior Court, Los Angeles County, seeking an Order Compelling Arbitration. RKO served the Notice and Summons upon the service agent designated by the investors to receive service on their behalf. RKO undertook no efforts to provide Barkley with personal notice of the proceedings, despite Barkley's previous communication with counsel for RKO. The Order Compelling Arbitration was granted on July 6, 1987.

An arbitration hearing was held on October 14, 1988, in which the arbitrator entered an award finding the investors jointly and severally liable to RKO in the amount of $666,885.00 plus interest and attorneys fees of $62,182.00 for a total of $729,067.00. The arbitration award was reduced to judgment in Superior Court of the State of California for the County of Los Angeles on February 8, 1988. [App., *infra*, G1-G4].

3. Oklahoma Action to Enforce California Judgment.

On June 20, 1988 RKO filed a Notice of Filing a Foreign Judgment in the District Court of Tulsa County, State of Oklahoma, seeking to enforce the California judgment against two Oklahoma investors, Barkley and Hayes.[2] [App., *infra*, H]. On July 11, 1988, Barkley filed an Answer in Objection to the Notice of Filing Foreign Judgment asserting failure to receive actual notice of the California proceedings and the denial of due process as a defense to the validity of the California judgment. [App., *infra*, I1-I13].

Barkley did not receive actual notice of the California proceeding and therefore due process was not satisfied under *Mullane v Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). RKO asserted that once service of process was completed upon the service agent, jurisdiction was acquired over Barkley, foreclosing further inquiry by the Oklahoma Court.

The parties submitted numerous briefs on the matter. In addition, several hearings were held in which the trial court entertained oral argument. RKO submitted the affidavit of Gregory Paul, the agent designated by the Investor Agreement to receive service of process on behalf of the investors. RKO asserted that Mr. Paul's affidavit established that Mr. Barkley was provided actual notice of the California proceedings. However, Mr. Paul did not specifically state in his declaration that Barkley received a copy of the Notice and Petition. In fact, Mr. Paul could

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[2] Tim Hayes was a party to all Oklahoma proceedings. He asserted positions similar to those taken by Barkley. Hayes is not a petitioner herein.

not make such a statement because he neither sent the document by certified mail, nor attempted to personally communicate with Barkley to insure receipt. In addition, Mr. Paul did not identify the actual date that he purportedly mailed the documents, nor did he indicate to what address, if any, the documents were supposedly mailed.

The evidence established that Mr. Paul delegated his personal responsibility to verify delivery of the documents to one Michael Lombardi[3] and his attorney, Frank Nemecek. However, neither of these individuals took any action to verify actual delivery to Barkley. In addition, at the time he accepted service from RKO, Mr. Paul had ceased practicing law and had become an officer of an entertainment company in Los Angeles.

Mr. Lombardi filed several affidavits in this case. In the initial affidavit, RKO failed to have Mr. Lombardi specifically mention Barkley. The second affidavit of Mr. Lombardi contained virtually the same language as the first, but did refer to Mr. Barkley. Lombardi's affidavit stated that he had been in telephone contact with Mr. Barkley, but the affidavit failed to specify the subject of the conversations. Notably, Mr. Lombardi never stated in his declaration that Barkley had notice of the California proceedings.

During one of the several hearings held on the matter, the trial court asked for evidence that Barkley had received actual notice of the proceedings. Once again, RKO turned to Mr. Lombardi for his "recollection" of telephone conversations with Barkley. RKO prepared a third affidavit for Lombardi's signature which reflected

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[3] Michael Lombardi was "trustee" for the syndicate of investors.

Lombardi's recollection that Barkley was aware of and had knowledge of the arbitration proceedings. Remarkably, Mr. Lombardi was able to "recall" these events some two years after the fact without any reliance upon written notes. The specificity of his recollection in his third affidavit was in marked contrast to the paucity of information provided about Barkley in his two previous affidavits.

RKO also prepared an affidavit for the signature of Angela Ruth Francisco, the secretary for Michael Lombardi. Ms. Francisco professed to have sent the Notice and Petition to Barkley. However, Ms. Francisco's testimony reflected that she could not recall whether she received the documents from Mr. Paul, or from Lombardi's attorney, Nemecek, or from counsel for RKO. Ms. Francisco also testified that she did not read the documents she was directed to send to the investors, nor could she recall the date the documents were sent. Further, she testified that she did not send the correspondence by certified mail.

RKO also prepared an affidavit for the signature of Mr. Nemecek, Mr. Lombardi's attorney. The affidavit suggested that Nemecek had several telephone conversations with Barkley, once occurring just two days prior to the arbitration hearing. Nemecek testified that in the ordinary course of his business as an attorney, he maintained notes of the substance of his telephone calls and that it would be unusual for him not to document a conversation. Nevertheless, Nemecek's notes of his conversation with Barkley did not reveal that Barkley had any notice of the arbitration proceeding. In fact, Nemecek's testimony reflected that the arbitration hearing was not even a

subject of discussion. Several unrelated matters were discussed.

Barkley introduced evidence regarding a conflict of interest of the supposedly "neutral" arbitrator selected by RKO. Nemecek's file contained a hand-written note memorializing a telephone conversation that Nemecek had with counsel for RKO concerning the choice of an arbitrator. They discussed Leon Kaplan, an attorney who eventually served as an arbitrator of the dispute. The note reflected that Kaplan's law partner was rendering tax advice to company officers interested in the acquisition of RKO. The evidence before the Oklahoma trial court reflected that on September 23, 1987, the arbitration hearing was held before Kaplan, with RKO and Michael Lombardi being the only parties represented. Kaplan found on behalf of RKO in the amount of $666,000.00. Kaplan stated in his ruling that the investors *admitted* their liability by virtue of the fact that they had attempted settlement with RKO.

Barkley also introduced evidence that in January of 1988, there was a proposed settlement between RKO and the California investors *only*. And, although the judgment at this time was approaching $800,000.00, the proposal provided that the California investors would pay $62,500.00 each to settle their claims with RKO, for a total of $250,000.00. A remarkable aspect of the proposed settlement was that the California investors were to fund legal fees incurred by RKO in enforcing the balance of the California judgment against the out-of-state investors. Obviously, Barkley and the other out-of-state investors were not privy to this arrangement.

Barkley demonstrated to the trial court that Lombardi had been a fruitful source of testimony and other

resources for RKO. The extent of cooperation provided to RKO by their witness, Lombardi, was demonstrated in a letter that Mr. Nemecek (Lombardi's attorney) sent to counsel for RKO on July 18, 1988, concerning Lombardi's efforts with respect to Ron Kubota, another investor who sought to vacate the judgment for lack of notice. The letter stated:

> I am also astounded by your attitude, based upon the extent of Mr. Lombardi's cooperation in this matter. **He gave you Kubota;** you would not have won the Motion without Lombardi and he fully and completely cooperated with you. . . . Further, **Mr. Lombardi has literally worked around the clock attempting to resolve the matter, at least to the California investors.** [emphasis supplied].

Based on the foregoing information, the Oklahoma trial court declined to recognize the California judgment holding that the California court did not have the requisite personal jurisdiction over Barkley and finding, as follows:

> 1. The mailing of the Notice and Petition alone was insufficient to enable the California court to obtain personal jurisdiction over Defendant Barkley and Defendant Hayes pursuant to the due process requirements which have been expressed in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 94 L.Ed. 865 (1950).
>
> 2. Defendant Hayes and Defendant Barkley did not have actual notice or knowledge of the California proceedings of September 23, 1987. [App., *infra*, A2-A3].

Thereafter, RKO filed a timely motion for new trial which was overruled.

4. Decision of the Oklahoma Court of Appeals.

The Oklahoma Court of Appeals reversed the trial court decision holding, essentially that despite this Court's ruling in *Mullane, supra,* and *National Equipment Rental Ltd. v. Szuhkent,* 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964), a trial court is powerless to consider whether service of process resulted in actual notice. The Court stated:

> "Whether Barkley . . . actually received the Notice and Summons is immaterial.
>
> * * *
>
> Under the California Code of Civil Procedure, § 416.90, service was "accomplished and completed" when Paul [service agent] received Notice and Summons from RKO. This ends the inquiry." [App. B].

In reversing the trial court, the Court of Appeals adopted the language of a 1958 Vermont Opinion, *Green Mountain College v. Levine,* 139 A.2d 822 (Vt. 1958), which was based on a statement appearing in *Pennoyer v. Neff,* 95 U.S. 714 (1877), despite the fact that *Pennoyer* was overruled in *Shaffer v. Heitner,* 433 U.S. 186, 212 n. 39, 97 S.Ct. 2569, 2584, n. 39, 53 L.Ed.2d 683 (1977).

The Oklahoma Court of Appeals cited California Code of Civil Procedures § 416.9 as stating:

> Service on a service agent is accomplished and completed when a copy of the Summons and Complaint is delivered to a person authorized to received service of process. No additional action is required. [App., *infra,* B5].

However, since 1970, § 416.90 has provided:

> A Summons may be served on a person not otherwise specified in this article by delivering a

> copy of this Summons and of the Complaint to such person or to a person authorized by him to receive service of process.

The language relied on by the Oklahoma Court of Appeals is not contained within the California statute itself, nor does it appear in any of the cases cited by RKO. The language was lifted directly from RKO's brief and erroneously relied upon by the Oklahoma Court of Appeals, both as an accurate statement of the California statute, and as a reason to reverse the trial court.

5. Petition for Rehearing before the Oklahoma Court of Appeals.

Barkley sought rehearing before the Oklahoma Court of Appeals [App., *infra,* J1-J16] arguing that the Court failed to apply federal constitutional law regarding the sufficiency of substituted service of process. Barkley relied upon *National Equipment Rental, Ltd. v. Szuhkent,* 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed 2d 354 (1964) where the Supreme Court indicated that substituted service of process on a contractually appointed agent survives constitutional due process scrutiny only if there is evidence the defendant actually received the process papers promptly upon service of the agent.

Co-Defendant Hayes asserted that the Court's reliance on *Green Mountain College v. Levine,* 139 A.2d 822 (Vt. 1958) is contrary to established California law. [App. *infra,* K1-K11]. The California Code of Civil Procedure § 473.5 permits attack on default judgments despite the fact that service of process may have properly occurred under statutory constructive notice provisions. California Code of Civil Procedure § 473.5 provides:

> (a) When service of a summons has not resulted in *actual notice* to a party in time to

> defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a motion to set aside the default or default judgment and for leave to defend the action.
>
> * * *
>
> (c) Upon a finding by the court that the motion was made within the period permitted by subdivision (a) and that his or her lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside the default or default judgment on whatever terms as may be just and allow the party to defend the action. [emphasis supplied].

The California courts have defined "actual notice" as "genuine knowledge of the party litigant and does not contemplate notice imputed to a principal from an [agent's] actual notice." *Rosenthal v. Garner*, 142 Cal. App. 3d 891, 191 Cal. Rptr. 300 (1983). Hayes reasoned that the Oklahoma trial court was correct in vacating the California judgment based on California Code of Civil Procedure § 473.5 and should therefore be affirmed.

Rehearing was denied April 7, 1992 by the Oklahoma Court of Appeals. [App., *infra*, C].

6. Oklahoma Petition for Certiorari.

Timely petitions for certiorari were filed with the Oklahoma Supreme Court by both Barkley and Hayes urging essentially the same grounds as were contained in the petitions for rehearing.

The Oklahoma Petitions for Certiorari were denied on October 1, 1992. [App., *infra*, D].

REASONS FOR GRANTING THIS PETITION

I. CONTRARY TO DUE PROCESS CONCEPTS ESPOUSED IN *MULLANE* and *SZUHKENT*, THE OKLAHOMA RULING DEPRIVES LITIGANTS OF CONSTITUTIONAL DUE PROCESS BY HOLDING THAT ACTUAL NOTICE OF A PROCEEDING IS IMMATERIAL.

A. *Mullane* mandates inquiry into the circumstances of service.

It is fundamental to this nation's system of jurisprudence that, at a minimum, every litigant facing deprivation of life, liberty or property by adjudication be afforded notice of the proceedings and opportunity for hearing. This fundamental notion of fairness is embodied in the due process clause of the Fourteenth Amendment to the Constitution of the United States. In *Mullane v. Central Hanover Bank & Trust Co.*, 539 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), this Court commented upon the requirements of the due process clause stating:

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657.

In the present case RKO obtained a default judgment against a non-resident defendant in a California court. It was undisputed that RKO served process upon the contractually appointed service agent, however, it was hotly disputed whether Barkley, in turn received notice of the pending action. In fact, the Oklahoma trial court specifically found that Barkley had not received actual notice

of the proceedings. [App. *infra*, A2-A3]. Yet, contrary to all precepts of due process, the Oklahoma Court of Appeals held that service is "accomplished and completed" when the agent received notice and summons from RKO. The Oklahoma Court of Appeals stated, "this ends the inquiry". In other words, according to the Oklahoma Court of Appeals, trial courts are *prohibited* from inquiring into the specific circumstances of a case to determine whether a Defendant is afforded due process.

The Oklahoma ruling cannot be reconciled with the United States Supreme Court's pronouncement in *Mullane* that:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
>
> * * *
>
> The notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . . . [citations omitted]. *Mullane*, 70 S.Ct. at 657.

In *Mullane*, after analyzing the notice requirement of constitutional due process, the Supreme Court held that although published notice comported with State law, such notice of an action to settle the accounts of a common trust fund was not constitutionally sufficient to inform the beneficiaries of the trust whose names and addresses were known. The *Mullane* Court emphasized that notice is constitutionally adequate when "the practicalities and peculiarities of the case . . . are reasonably

met." *Mullane*, 70 S.Ct. at 657. The *Mullane* Court recognized "the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will *vary* with circumstances and conditions." *Id.* The Court has stated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961).

Thus, contrary to the holding of the Oklahoma Court of Appeals, *Mullane* **mandates** inquiry into the circumstances of service in order that it can be determined whether the notice was reasonably calculated **under all the circumstances**, to apprise interested parties of the pendency of the action and afford them the opportunity to object to a deprivation of property. The necessity of inquiry into the substance of the service of process is underscored by the fact that in this case, the deprivation of property was in excess of $725,000, and Barkley was denied any opportunity to defend the action on the merits.

RKO indisputably possessed Barkley's name and address. Indeed Barkley had communicated directly with counsel for RKO concerning his interest in the matter. [App., *infra*, F]. Further, in the trial court, Barkley introduced evidence raising questions as to the conflicting allegiances of the service agent, his secretary, and the so-called "trustee" of the Investors Syndicate.

In accordance with *Mullane*, the Oklahoma trial court took all those factors into account and determined that the California judgment was not entitled to full faith and credit because of constitutional deficiencies in the notice afforded Barkley. Yet, the Oklahoma Court of Appeals

determined that the only relevant due process considerations are (1) whether there was an agreement to appoint an agent for acceptance of service of process and (2) whether the service was conducted according to § 416.90 of the California Code of Civil Procedure.

In reaching its conclusion, the Oklahoma Court of Appeals cited and relied on language supposedly contained in the California Code of Civil Procedure. However, scrutiny of the California statute reveals that the language relied on by the Oklahoma Court of Appeals is not contained within the statute itself, nor does it appear in any of the cases cited by RKO. The language was apparently lifted directly from RKO's brief and relied upon by the Oklahoma Court of Appeals as an accurate statement of the California statute. However, prevailing California authority is contrary to the phantom statutory citation relied upon by the Oklahoma Court of Appeals.

In *Pasadena Medi-Center Associates v. Superior Court*, 9 Cal.3d 773, 108 Cal.Rptr. 828, 511 P.2d 1180 (Cal. 1973), *Pasadena* sought mandamus to quash service of summons and to vacate a default judgment. Pasadena was a California corporation that had defaulted on the payment of two promissory notes to the plaintiff. Plaintiff's counsel had encountered difficulty in determining the proper individual to serve process upon as a corporate representative of Pasadena. The plaintiff was able to obtain an application from a state agency which provided the names of Pasadena officers and directors. Relying on this document, the plaintiff's counsel served the individual identified as secretary/treasurer of the company. Because of an error in the application, the plaintiff's counsel served the wrong person.

The record before the *Pasadena* Court reflected that Albert Binney, Sr. (the wrong person) immediately notified his son, Albert Binney, Jr. (the right person) of the action which had been commenced against Pasadena. Albert Binney, Jr. met with the other members of Pasadena's board of directors to discuss the litigation. Lacking a defense, the company did not contest the action and Plaintiff obtained the default judgment against Pasadena. Later, Pasadena attempted to vacate the default judgment because of the Plaintiff's technical failure to serve the proper corporate officer.

The *Pasadena* Court found that service on the wrong officer was valid (and justified) under the principles of ostensible authority as *Pasadena* had made public representations that Albert Binney, Sr. was a corporate officer. *Pasadena*, 511 P.2d at 1183. Further, the Court took note of comments provided by drafters of the statutes respecting service of process that:

> The provisions of this chapter should be liberally construed to effectuate service and uphold the jurisdiction of the Court **if actual notice has been received by the Defendant . . . Pasadena**, 511 P.2d at 1184 [emphasis supplied].

Other California opinions have held that service of process on an individual defendant may be delivered to an agent, however, the principal/agent relationship must be close and enduring enough to make it *highly probable* that the defendant will receive actual notice. Thus, the jurisdiction of a California court can only be upheld if *actual notice* has been provided by the agent to the principal. *Warner Bros. Records, Inc. v. Golden West Music Sales*, 36 Cal.App.3d 1012, 112 Cal.Rptr. 71, 74 (1974).

Despite contrary United States Supreme Court and California authority, under the Oklahoma analysis, the

actual relationship between the principal and an agent and whether service of process resulted in actual notice of proceedings and other facts of a case are irrelevant to a determination of a due process question. Under the Oklahoma analysis, even the facts presented by *Mullane*, would have merited no further scrutiny beyond determining whether service was completed according to statute. Yet, *Mullane mandates* inquiry into the circumstances of the case to determine whether notice was "reasonably calculated under *all* the circumstances" to apprise parties of the pendency of an action. *Mullane*, 70 S.Ct., at 657.

The *Mullane* Court did not say that due process requires only compliance with statutory procedures, indeed, if that were the case, there would be no need, ever, for a due process analysis.

B. *Szuhkent* requires actual notice of proceedings.

The rule is well-settled that parties to a contract may agree to the manner in which service of process is delivered by the opposing party. *National Equipment Rental, Ltd. v. Szuhkent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d, 354 (1964). In *Szuhkent*, the underlying contract permitted service of process to be made upon an agent specified in the contract. The defendant, Szuhkent, was not a resident of the state in which the action was commenced. Under these circumstances, the *Szuhkent* Court held that prompt acceptance and transmission of the Summons and Complaint by the agent to the defendant was sufficient to validate the agency and permit the New York Court to exercise personal jurisdiction. *Szuhkent*, 375 U.S. at 318, 84 S.Ct. at 416. However, the Court expressed an apparent disapproval for this kind of service method even though the record was clear that the defendants had received

actual notice from the designated agent. The Court strongly suggested that if Szuhkent had not received actual notice, a due process problem was inevitable.

> We need not and do not in this case reach the situation where **no personal notice has been given to defendant**. Since the respondent did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is quite different from cases where there is no actual notice, such as . . . *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. [emphasis supplied].

(*Szuhkent*, 375 U.S. at 15, 84 S.Ct. at 414).

The *Szuhkent* Court suggested that a different case would have been presented had actual notice not been provided to the defendants. *Szuhkent*, 375 U.S. at 318, 84 S.Ct. at 415-16. The Court noted that, " . . . adequate and timely notice . . . is a prerequisite to a valid judgment." *Szuhkent*, 375 U.S. at 18, 84 S.Ct. at 415.

Even though a party may designate a representative to accept service of process, the failure to provide actual and timely notice will call into question the validity of the judgment. *Szuhkent* recognized the legitimacy of an agent appointed by contract only because the plaintiff had demonstrated actual transmission by the agent and *receipt* by the defendant.

In the present case, unlike *Szuhkent*, Barkley, did not receive actual notice of the proceedings. According to the reasoning of *Szuhkent*, and contrary to the Oklahoma Court of Appeals, statutory service upon a contractually appointed agent does not "end the inquiry".

C. Due Process cannot depend on a party's level of sophistication.

The Oklahoma Court of Appeals placed undue weight on the fact that Barkley was an investor in a sophisticated multi-million dollar motion picture deal and the fact that Barkley is a practicing lawyer. The Oklahoma Court of Appeals reasoned that since Barkley was a party to an arms-length transaction and that RKO served the service agent according to the terms of the Agreement, RKO's manner of service satisfied due process requirements. However, in *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180, (1983) the United States Supreme Court expressly rejected the notion that one's constitutional right to due process is somehow tied to the level of sophistication possessed by a party. The *Mennonite Board* Court held:

> "Notice by mail or other means *as certain* to ensure *actual notice* is a minimum constitutional precondition to a proceeding which will adversely effect the liberty or property interests of **any** party, whether unlettered or well-versed in commercial practice, if its name and address are reasonably ascertainable." 462 U.S. 800, 103 S.Ct. 2712. [emphasis supplied].

The Oklahoma Court of Appeals denied Barkley the "minimum constitutional precondition" of actual notice by holding that "whether Barkley and Hayes actually received the Notice and Summons is immaterial". [App. B-7].

II. THIS COURT HAS NOT DIRECTLY ADDRESSED WHETHER, ABSENT ACTUAL NOTICE, SERVICE OF PROCESS UPON A CONTRACTUALLY APPOINTED SERVICE AGENT WILL SATISFY DUE PROCESS, WHEN APPLIED TO AN INDIVIDUAL.

In *Szuhkent*, 375 U.S. at 15, 84 S.Ct at 414, the United States Supreme Court considered whether service of process upon a contractually appointed agent satisfied due process. However, the Court was not confronted with the situation present in the instant case because in *Szuhkent*, the record was unequivocal that, despite the manner of service, the defendant received actual personal notice of the proceedings. In 1964, the *Szuhkent* Court stated:

> We need not and do not in this case reach the situation where **no personal notice has been given to defendant.** Since the respondent did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us in quite different form cases where there is no actual notice, such as . . . *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. [emphasis supplied].

Since 1964, the United States Supreme Court has not addressed the question obviously left open in *Szuhkent*. Were the United States Supreme Court to accept certiorari in the instant case, the Court could address precisely the situation left open in *Szuhkent*.

This case presents the opportunity for the United States Supreme Court to expand *Szuhkent* to the next logical extension. At the same time, the Court can *directly* address the parameters of *Mullane* in the context of constructive service of process upon an individual citizen, as opposed to a corporation or other organization. Both the

analysis employed and the result reached by the Oklahoma Court of Appeals underscore the compelling need for the United States Supreme Court to accept certiorari and render an opinion in this case.

III. THE COURT HAS NOT ADDRESSED WHETHER DUE PROCESS IS VIOLATED BY CONFERRING GREATER "CREDIT" ON A SISTER STATE JUDGMENT THAN IT WOULD HAVE BEEN ACCORDED BY THE RENDERING STATE.

The United States Supreme Court has determined that a federal court is *prohibited* from giving greater preclusive effect to a state court judgment than would the state court rendering the judgment. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1331, 84 L.Ed.2d 274 (1985). Barkley submits that the same analysis should be applied to the enforcement of a state court judgment because the same statutory language operates on federal and state courts alike. However, the United States Supreme Court has not previously addressed the precise issue presented herein.

The notion of full faith and credit is constitutional. Article IV, Section 1 of the United States Constitution provides:

> Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

This constitutional concept was codified by Congress at 28 U.S.C. § 1738, which provides:

> **§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit**

> The Acts of the legislature of any State, Territory, or Possession of the United States or copies thereof, shall be authenticated by affixing the seal of the State, Territory of Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the Court annexed if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, **shall have the same full faith and credit in a court** within the United States and its Territories and Possessions **as they have by law or of usage in the courts of such State, Territory or Possession from which they are taken.** [emphasis supplied].

It has been long established that where full faith and credit applies, a judgment need only be given "the same credit, validity and effect . . . which it had in the State where it was pronounced." *Williams v. North Carolina*, 325 U.S. 226, 228-29, 65 S.Ct. 1092, 1094, 89 L.Ed. 1577 (1945). Thus, if a state court judgment is subject to collateral attack in the state that rendered it, the judgment may be collaterally attacked in federal court, or in the courts of a sister state.

In *New York, ex rel Halvey v. Halvey*, 330 U.S. 610, 614-15, 67 S.Ct. 903, 905-06, 91 L.Ed. 1133 (1947), the Court held:

> [A] judgment has no constitutional claim to a more conclusive or final effect in the State of the

> [enforcing] forum than it has in the State where rendered. . . .
> [I]t is clear that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered. . . . [4]

A two level analysis is mandated for questions involving full faith and credit. First, a court must determine whether the judgment possessed the requisite validity to apply full faith and credit. In other words, a court must determine whether the rendering court had jurisdiction over the parties and over the subject matter. Once that determination is made, the court must look next to state law to determine how much credit the judgment deserves. *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1020 (5th Cir. 1982). Obviously a determination of full faith and credit cannot be made without reference to the law of the rendering state. In this case, analysis of California law is required.

The California Code of Civil Procedure contains a provision permitting vacation of default judgment when statutory service of summons has failed to result in actual notice. Section 473.5 of the California Code of Civil Procedure provides:

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[4] See also *Ford v. Ford*, 371 U.S. 187, 192, 83 S.Ct. 273, 276, 9 L.Ed.2d 240 (1962) ("the Full Faith and Credit Clause . . . would require South Carolina to recognize the Virginia order as binding only if a Virginia Court would be bound by it".) *Sherrer v. Sherrer*, 334 U.S. 343, 351, 68 S.Ct. 1087, 92 L.Ed. 1429 (1948) (full faith and credit must be accorded where the judgment is not susceptible to collateral attack in the court's of the state where rendered.) *Hazen Research, Inc. v. Omega Minerals, Inc.*, 497 F.2d 151, 153 (5th Cir. 1974); *Yale v. National Indemnity Co.*, 602 F.2d 642, 644 (4th Cir. 1979); *Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1020 (5th Cir. 1982).

> (a) "When service of a summons has not resulted in actual notice to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a motion to set aside the default . . . "

Section 473.5 was construed in *Rosenthal v. Garner*, 142 Cal.App.3d.891, 191 Cal.Rptr. 300 (1983). In *Rosenthal*, the plaintiffs served the attorney for the defendant with summons and notice. The attorney failed to notify the defendant of the proceeding, thereafter a default judgment was taken against the defendant. Upon receiving notice of the default judgment the defendant, through the attorney who failed to give the defendant notice and summons, brought a motion to vacate the default judgment under § 473.5. The defendant claimed he had not received actual notice of the proceeding in time to appear and defend. *Rosenthal*, 142 Cal.App.3d. at 893-895.

The *Rosenthal* Court found that § 473.5 *demands* that the defendant have actual notice of the proceedings. Defining "actual notice", the Court stated:

> "Actual notice" means genuine knowledge of the party litigant and does not contemplate notice imputed to a principal from an [agent's] actual notice. *Rosenthal*, 191, Cal.Rptr. at 895.

Subsequent California decisions have followed the strict construction of "actual notice" to the litigant with the aim of implementing the policy of liberally granting relief so the cases may be resolved by the merits. *See Olvera v. Olvera*, 232 Cal.App.3d 32, 283 Cal. 271 (1991). The California statute and cases requiring actual notice of proceedings is in accord with the due process concepts espoused by the United States Supreme Court in *Mullane* and *Szuhkent*. The Oklahoma Court of Appeals not only

departed from, but ignored, these due process concepts, thus depriving Barkley of the minimal constitutional guarantees afforded every citizen of the United States.

The record in this case reveals that Barkley did not receive actual notice of the proceedings in California in time to appear and defend. Since Barkley did not receive "actual notice" of the California proceedings, as required under the California Code of Civil Procedure § 473.5, California law provides a defense to the default judgment. The Oklahoma Court of Appeals' failure to recognize that defense deprived Barkley of the process he would have been due in California courts in a contest of the judgment sought to be enforced in the present case. This deprivation renders the Oklahoma result constitutionally defective.

Moreover, the Oklahoma Court of Appeals held that the trial court erroneously relied on Okla.Stat.Tit. 12 § 713 in denying the California judgment credit in Oklahoma. Section 713 is part of the Uniform Money Judgments Recognition Act, Okl.Stat.Tit. 12 §§ 710, *et seq.* and provides, in relevant part:

> **§ 713. Grounds for non-recognition.**
>
> (a) A foreign judgment is not conclusive if
>
> * * *
>
> (2) the foreign court did not have personal jurisdiction over the defendant or . . .
>
> * * *
>
> (b) a foreign judgment need not be recognized if
>
> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend; . . .

* * *

The Oklahoma Court of Appeals determined that under the Oklahoma statutory scheme, § 713 applies to judgments of foreign nations, not sister states. In addition, the Oklahoma Court of Appeals held that § 713:

> "is not an appropriate test for determining the enforceability of judgments of sister states. The correct test is whether the California court had jurisdiction over Barkley and Hayes to enter the judgment it did. If the California court had jurisdiction, then its judgment is entitled to full faith and credit under the constitution.
>
> * * *
>
> Unless Barkley and Hayes can show some irregularity in the proceedings resulting in the California court not having personal jurisdiction over them, we must give the California judgment full faith and credit." [App., *infra*, B4]

This analysis obviously fails to take into account California law which permits vacation of default judgment on *precisely* the same terms as § 713. By refusing to recognize the defense available to Barkley in California, the Oklahoma Court of Appeals conferred *greater credit* upon the California judgment than it would be accorded in California, thus depriving him of due process in California.

CONCLUSION

Unquestionably, Barkley was deprived of property in an amount of over $725,000.00 without actual notice of the proceedings and an opportunity to defend. This case presents an opportunity for the United States Supreme Court to reaffirm the long-standing due process espoused in *Mullane*, *Szuhkent*, and *Mennonite Board*. The case also

presents the heretofore unanswered question of whether a state is constitutionally permitted to confer greater credit on a sister state judgment than the judgment would have been accorded by the rendering state. Furthermore, acceptance of certiorari will provide Barkley his first and only opportunity to defend this action on the merits.

For these reasons, Petitioner, Michael Barkley, respectfully seeks Certiorari.

Respectfully submitted,

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Attorneys for Petitioner
Michael Barkley

APPENDIX A

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY STATE OF OKLAHOMA

IN THE MATTER OF THE ARBITRATION BETWEEN RKO PICTURES, INC. a corporation,	§	Case No. CJ-88-3802
Plaintiff,	§	(Filed Dec. 4, 1989)
vs.	§	
MICHAEL P. LOMBARDI, individually, and as Trustee for RKO "Plenty" syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA; and RONALD NELSON,	§	
Defendants.	§	

ORDER

Now on this 26th day of October, 1989, comes on for hearing and final determination, Defendant Michael Barkley and Defendant Tim Hayes' Objection and Motion to Vacate Foreign Judgment. Plaintiff, RKO Pictures, Inc. ("RKO") appeared by its counsel Thomas A. Mann. Defendant, Michael Barkley, appeared by his counsel, Stephen J. Rodolf and John D. Clayman. Defendant Tim Hayes appeared by his counsel, George S. Thompson.

At the hearing in this matter held on August 21, 1989, the Court had determined that the following issues remained for adjudication:

1. Whether the mailing of the Notice and Petition for Arbitration alone was sufficient to

satisfy due process considerations to enable the California court to obtain personal jurisdiction over Defendant Mike Barkley and Defendant Tim Hayes.

2. If the mailing of the Notice and Petition for Arbitration alone was insufficient, whether RKO can show that Defendant Michael Barkley and Defendant Tim Hayes had actual notice of the arbitration hearing held on September 23, 1987.

Pursuant to the Order of the Court, the parties filed additional memoranda on the above issues.

Plaintiff objected to the response brief filed by Defendant Barkley on October 23, 1989, and moved the Court to strike the pleading. After hearing argument of counsel, Plaintiff's motion to strike was denied by the Court.

The Court, after reviewing the entire pleadings in the case, and after oral argument by the respective parties, finds as follows:

1. The mailing of the Notice and Petition alone was insufficient to enable the California court to obtain personal jurisdiction over Defendant Barkley and Defendant Hayes pursuant to the due process requirements which have been expressed in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

2. Defendant Hayes and Defendant Barkley did not have actual notice or knowledge of the California proceedings of September 23, 1987.

Based upon the above determinations, this Court finds that the California courts did not have the requisite personal jurisdiction over Defendant Barkley and Defendant Hayes and that pursuant to 12 O.S. § 713(a)(2) & (B)(1), the foreign judgment filed by the Plaintiff shall not be recognized by a Court of this jurisdiction.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED, that Defendants' Objection and Motion to Vacate the Foreign Judgment is granted and that the Foreign Judgment filed by RKO Pictures, Inc. against Defendant Michael Barkley and Defendant Tim Hayes be vacated and dismissed.

/s/ Donald C. Lane
HONORABLE
DONALD C. LANE
Judge of the District Court

APPENDIX B

RELEASE FOR PUBLICATION
BY ORDER OF COURT OF APPEALS

THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

DIVISION III

In the Matter of the Arbitration between RKO PICTURES, INC., a corporation, Appellant, versus MICHAEL BARKLEY and TIM HAYES, Appellees and MICHAEL P. LOMBARDI, and as Trustee for RKO "Plenty" Syndicate; LES BARKLEY; KATHY MAHER; RON KUBOTA; AND RONALD NELSON, Defendants,	Case Number 75,649 (Filed FEB 25 1992)

APPEAL FROM THE DISTRICT COURT OF
TULSA COUNTY, OKLAHOMA

HONORABLE DONALD C. LANE JUDGE

REVERSED AND REMANDED WITH INSTRUCTIONS

Thomas A. Mann
Tulsa, Oklahoma For Appellant,

Stephen J. Rodolf, and
John D. Clayman
Tulsa, Oklahoma — For Appellee Michael Barkley,

George S. Thompson
Tulsa, Oklahoma — For Appellee, Tim Hayes.

OPINION

Opinion by STEWARD M. HUNTER, Judge:

Appellant, RKO, appeals from the trial court's order granting Barkley's and Hayes's Motion to Vacate RKO's California judgment against them.

Barkley and Hayes, citizens of Tulsa, Oklahoma, made an Agreement with RKO and five other Investors to invest in the motion picture "Plenty," starring Meryl Streep. The group of seven Investors, known collectively as the "Plenty" Syndicate, agreed to assume RKO's obligation to Twentieth Century Fox Film Corporation to pay Fox any shortfall in revenues resulting from the picture's producing gross receipts less than $3,500,000.00. In return, the "Plenty" Syndicate was to receive a portion of any gross receipts exceeding $3,500,000.00. The parties signed the Agreement on September 13, 1985.

Terms of the Agreement

Under Paragraph 15(f) of the Agreement, the parties agreed that they would serve "all notices, payments and other communications hereunder" by U.S. mail on Michael R. Lombardi. Lombardi was one of the Investors, and Trustee for the RKO "Plenty" Syndicate. The parties

also agreed, "Any notice so addressed and sent by mail shall be deemed to have been given when mailed."

Under Paragraph 15(g) the parties agreed to resolve all disputes under the Agreement by binding arbitration.

Under Paragraph 15(k), the parties agreed that they would enforce the Agreement under California law in either state or federal court in Los Angeles. The parties also agreed that any judgment entered by either court would bind them. The Investors appointed Gregory Paul, a Los Angeles lawyer, as their agent for service of process in any suit arising out of the agreement.

The California Judgment

In June, 1987, RKO filed suit in State Court in Los Angeles against the Investors.[1] RKO sought a judgment to compel arbitration of a dispute under the Agreement. On June 17, 1987 Paul, the Investors' service agent, accepted copies of the Notice and Petition in RKO's suit to compel arbitration. On June 18, 1987, Paul mailed copies of the Notice and Petition to Barkley and Hayes, and to each of the other Investors.[2]

The arbitration hearing took place on September 23, 1987. The California court entered judgment against the

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[1] Appellant, RKO, changed its corporate name to Entertainment Acquisition Corporation sometime between the date it signed the Agreement and the date it filed suit. For the sake of simplicity, however, we will refer to Appellant as RKO.

[2] The trial court found that Paul was served by RKO and that Paul mailed copies of the Notice and Petition to Barkley and Hayes.

seven Investors on March 7, 1988. The California court followed the arbitrator's recommendation and awarded $729,736.80, plus interest at ten percent from March 25, 1987, and an attorney fee of 27,652.00.

Barkley and Hayes claim, and the trial court found, that Barkley and Hayes did not receive Paul's letter. Barkley and Hayes also claim they knew nothing about the arbitration or the judgment until after the arbitration hearing an entry of judgment.[3]

ISSUE

There is but one issue here. Were due process notice requirements satisfied by RKO's service of the notice and Petition on Paul? RKO's service of process on Barkley and Hayes satisfied due process notice requirements. Barkley's and Hayes's testimony that they did not receive the Notice and Summons Paul mailed to them does not change the result.

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[3] Barkley and Hayes also deny they received any of several letters Lombardi, Trustee for the "Plenty" Syndicate, swore he sent to them concerning the "Plenty" Syndicate, in July 1987. Barkley denies several telephone conversations Lombardi swore they had. Barkley's denial comes in the face of Southwestern Bell's telephone records, and Lombardi's office records, showing a thirty seven minute conversation between Barkley's and Lombardi's offices on August 17, 1987. Those records reflect another conversation between the two offices of twenty three minutes on September 21, 1987. The September 21 call took place two days before the arbitration hearing. Barkley's and Lombardi's only connection was the "Plenty" Syndicate.

I.

The trial court erroneously relied on, 12 O.S. 1981 § 713 in its Order granting Barkley's and Hayes's Motion to Vacate Judgment. Section 713 is part of the Uniform Money-Judgments Recognition Act, 12 O.S. 1981 §§ 710, et seq. Section 713 applies only to judgments of *foreign nations*. It does not apply to judgments of *sister states*. Section 710 defines the term "foreign state" as "any governmental unit *other than the United States, or any state* [or any Territory or possession of the United States]." [Emphasis added.] The trial court erred in relying on § 713(b)(1), which allows a court to deny recognition of a foreign judgment where "the defendant . . . did not receive notice in sufficient time to enable him to defend." This is not an appropriate test for determining the enforceability of judgments of sister states.[4] The correct test is whether the California court had jurisdiction over Barkley and Hayes to enter the judgment it did. If the California court had jurisdiction, then it's judgment is entitled to full faith and credit under the constitution. Every state must give full faith and credit to valid judgments of sister states. Title 12 O.S. §§ 710, et seq., contains no such requirement.

Title 12 O.S. 1981 §§ 719, et seq., the Uniform Enforcement of Foreign Judgments Act, governs the enforcement in Oklahoma of judgments of sister states. Section 720 of the Act defines a "foreign judgment" as a judgment or decree "of the United States or any other

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[4] In their trial court briefs, Barkley and Hayes claimed that 12 O.S. 1981 §§ 710, et seq. applied to judgments of sister states. RKO did not point out the Act's inapplicability to the trial court.

court which is entitled to full faith and credit in this state." Section 721 of the Act allows the filing of a foreign judgment in the office of the court clerk of any county in Oklahoma. Section 721 further provides,

> A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a district court of this state an may be enforced and satisfied in like manner.

Under § 721, the foreign judgment is final for all purposes except lack of jurisdiction of the foreign court. *Aetna Finance Co. v. Bowler*, 622 P.2d 292 (Okl.App. 1980), In *Aetna Finance*, the court said:

> The intent of full faith and credit is to announce to a defendant that it must stand by the decision of a court within the United States that had personal jurisdiction of the parties. *The decision rendered is a decision of that state and has the effect ascribed to it by the law of the rendering state.* [Emphasis added.]

Unless Barkley and Hayes can show some irregularity in the proceedings resulting in the California court not having personal jurisdiction over them, we must give the California judgment full faith and credit.

II

We turn now to whether how RKO served process on Barkley and Hayes in the California suit denied them due process. Barkley and Hayes claim the trial court's finding of fact that they did not receive the Notice and Petition Paul mailed to them shows that they were denied due process. We disagree.

In the Agreement, Barkley and Hayes agreed the parties would resolve any disputes between them through binding arbitration. The parties appointed Paul as their service Agent. They agreed to try any suit involving the "Plenty" Syndicate in Los Angeles.

California law provides that a plaintiff may serve process on the defendant by serving "a person authorized by [the defendant] to receive service of process." Calif. Code Civ. Proc. § 416.90.[5] Under § 416.90,

> Service on a service agent is accomplished and completed when a copy of the summons and complaint is delivered to a person authorized to receive service of process. No additional action is required.

Barkley and Hayes rely on *National Equipment, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Neither provides Barkley and Hayes a defense.

In *National Equipment v. Szukhent*, Id., plaintiff served defendants, two Michigan farmers, through a New York

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[5] Provisions approving service on an agent are prevalent throughout the United States. See, for example, Rule 4(d)(1), Federal Rules of Civil Procedure and 12 O.S. 1990 Supp § 2004.C.1.c(1) (plaintiff may serve "an agent authorized by apppointment"). The courts have held that such service comports with due process requirements. *Kenny Construction v. Allen*, 248 F.2d 656 (DC Cir. 1957). (Agreement to appoint Clerk of D.C. Municipal Court in contract between consulting engineering firm and the District of Columbia upheld, where engineering firm, a Maryland resident was served through the Court Clerk.)

service Agent. Defendants appointed the New York service agent in a farm equipment lease they had made with plaintiff. A majority of the court held that parties to a contract may agree in advance to submit to the jurisdiction of a particular court and to be served through a service agent they have agreed to in the contract. The court held the case involved no due process issue because defendants admitted they had received a copy of the summons from the New York service agent.

In *National Equipment,* Justice Black wrote a dissent, and Justice Brennan, in which Chief Justice Warren and Justice Goldberg concurred, wrote another. Both dissents would have held that defendants due process rights were violated. Both dissents stressed, however, that the contract involved was a form lease covering farm equipment and the defendants were unsophisticated farmers. Justice Brennan said, "It offends common sense to treat a printed form which closes an installment sale as embodying terms to all of which the individual *knowingly assented.*" [Emphasis added.] Thus, the dissenters thought defendants were denied due process because plaintiff had not shown that defendants had "knowingly assented" to appoint a New York service agent.

By contrast with the facts of *National Equipment,* Barkley and Hayes were investors in a sophisticated multimillion dollar motion picture deal. Barkley and Hayes admit that they signed the contract. They do not deny that they understood its provisions. Barkley is a practicing lawyer. Barkley's and Hayes's Agreement with RKO was not a form. Further, paragraph 16 of the Agreement provided:

> EACH PARTY HERETO HAS BEEN ADVISED TO SEEK THE OPINION OF HIS OR HER OR ITS SEPARATE LEGAL COUNSEL REGARDING THE AGREEMENT, AND HAS DONE SO. [Capitalization as in the original.]

Barkley and Hayes were parties to an arm's length transaction from which they hoped to make a great deal of money. They made a bargain with RKO and their fellow Investors. RKO served them through Paul, their service agent, according to the terms of the Agreement. RKO's manner of service satisfied due process requirements. Barkley and Hayes are liable under the judgment.

Mullane v. Central Bank & Trust Co. of Hanover, Id., also fails to support Barkley's and Hayes's position. In *Mullane*, the court held that service by publication violated 14th Amendment due process requirements if the plaintiff did not first diligently try to find the defendant and give him actual notice of suit "within the limits of practicability." Id., 339 U.S. at 318. In *Mullane*, the plaintiff did not show that it attempted to find the defendants it served before seeking to cut off their rights by publication. The court, however, pointed out that due process does not require actual notice in all cases. Even notice by publication satisfies due process requirements if plaintiff makes a showing of having first diligently tried to find the defendant so notified. Due process requires only:

> Notice reasonably calculated under all the circumstances to apprise interested parties of the tendency of the action and afford them an opportunity to present their objections.

Mullane, Id. 339 U.S. at 314.

Whether Barkley and Hayes actually received the Notice and Summons is immaterial. In *Green Mountain College v. Levine*, 139 A.2d 822 (Vt. 1958) defendant agreed to service on the Secretary of State, under the terms of a contract he had made with the plaintiff. The court held,

> The danger that [the Secretary of State] might not forward notice to the defendants were risks which they took in appointing him.

Id. 139 A.2d at 825.

The court quoted from *Pennoyer v. Neff*, 95 U.S. 714 (1877), in which the court said that where one agrees to a particular mode of service,

> [He] should be bound by a judgment in which that mode of notification [of legal proceedings] has been followed, *even though he may not have actual knowledge of them.* [Emphasis supplied.]

We find *Green Mountain College v. Levine* persuasive and adopt its reasoning.

Under the California Code of Civil Procedure, § 416.90, service was "accomplsihed and completed" when Paul received Notice and Summons from RKO. This ends the inquiry. We find that Barkley and Hayes agreed to service upon Paul. Service upon Paul provided "notice reasonably calculated" to apprise Barkley and Hayes of the pendency of RKO's suit. *Mullane*, Id. Barkley's and Hayes's claim that they did not receive copied of the Notice and Summons does not create a due process issue.

The trial court's judgment is REVERSED and REMANDED. The trial court is instructed to set aside its Order Vacating Foreign Judgment, and enter an order

recognizing RKO's judgment as an Oklahoma judgment from the date of its filing in the District Court of Tulsa County, on June 20, 1988.

HANSEN, V.C.J. and JONES, J. concur.

APPENDIX C

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF APPEALS

DIVISION 3

APRIL 2, 1992

(Filed April 7, 1992)

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

75,649 – In the Matter of the Arbitration between RKO Pictures, Inc., a corporation, Appellant v. Michael Barkley and Tim Hayes, Appellees and Michael P. Lombardi, and as Trustee for RKO "Plenty" Syndicate; Les Barkley; Kathy Maher; Ron Kubota; and Ronald Nelson, Defendants.

Appellees' Petitions for Rehearings are DENIED.

75,890 – Robert I. Huffman, Appellant v. Alloy Components, Inc., Appellee and Greg Flory, Defendant.

Appellant's Petition for Rehearing is DENIED.

DONE BY ORDER OF THE COURT OF APPEALS IN CONFERENCE this 2nd day of April, 1992.

/s/ Carol M. Hansen
CAROL M. HANSEN,
Vice-Chief Judge

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, October 1, 1992

(Filed Oct. 1, 1992)

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

69,658 Peat, Marwick, Mitchell & Company et al. v. The Honorable Charles S. Woodson.
Rehearing denied.
CONCUR: Opala, C.J., Hodges, V.C.J., Hargrave, Wilson, Summers, Watt, JJ.
DISSENT: Lavender, Simms, JJ.
RECUSED: Kauger, J.

72,233 James Lee Walker v. The City of Moore, Oklahoma.
Rehearing denied.
CONCUR: Opala, C.J., Lavender, Hargrave, Wilson, Summers, Watt, JJ.
DISSENT: Simms, J.

74,823 Louise Belle Garner v. Earl Leslie Garner.
Certiorari denied.
CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Summers, Watt, JJ.

75,139 Lisa Ann Haggard v. The City of Broken Arrow, an Oklahoma municipal corporation et al.
Petition for certiorari dismissed as untimely filed.
CONCUR: Opala, C.J., Lavender, Hargrave, Kauger, Watt, JJ.

DISSENT: Summers, J.
Hodges, V.C.J., with whom Simms, J. joins, dissenting. I would deny certiorari.

75,142 In the Matter of the Guardianship of Pearl M. Giles.
Robert T. Keel, Guardian of Vaughn Giles, an incompetent v. Vaughn Marshall and United States Fidelity & Guaranty Company.
Certiorari denied.
CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Summers, Watt, JJ.

75,319 Barbara A. Dalton v. Lawton Teaches Federal Credit Union.
Certiorari denied.
CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Summers, Watt, JJ.

75,649 In the Matter of the Arbitration between RKO Pictures, Inc., a corporation v. Michael P. Lombardi, individually and as trustee for RKO "Plenty" syndicate et al.
Both petitions for certiorari denied.
CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Hargrave, Watt, JJ.
NOT PARTICIPATING: Summers, J.

76,117 Carl McCauley v. Kevin Schlemmer and Mid-Continent Casualty Company.
Certiorari denied.
CONCUR: Opala, C.J., Hodges, V.C.J., Lavender, Simms, Hargrave, Wilson, Summers, Watt, JJ.

76,468 John Garber Stemmons v. Carol Stemmons Marks, Trustee.

Certiorari denied.

CONCUR: Opala, C.J., Lavender, Simms, Wilson, Summers, JJ.

DISSENT: Hodges, V.C.J., Hargrave, Watt, JJ.

/s/ Marion P. Opala
CHIEF JUSTICE

APPENDIX E

AGREEMENT

THE PARTICIPATION SHARES GRANTED PURSUANT TO THIS AGREEMENT HAVE BEEN GRANTED PURSUANT TO A NONPUBLIC OFFERING AND IN CONFORMITY WITH CALIFORNIA CORPORATION CODE SECTION 25102(f). TEXAS CORPORATIONS CODE SECTION 5C(I), AND SECTION 4(2) OF THE SECURITIES ACT OF 1933, AS AMENDED, AND SUCH PARTICIPATION SHARES HAVE NOT BEEN QUALIFIED WITH THE COMMISSIONERS OF CORPORATIONS OF THE STATE OF CALIFORNIA OR OF THE STATE OF TEXAS NOR REGISTERED WITH THE SECURITIES AND EXCHANGE COMMISSION. THE OWNERS OF SAID PARTICIPATION SHARES HAVE MADE INVESTMENT REPRESENTATIONS HEREUNDER WITH RESPECT THERETO. ACCORDINGLY, THE SALE, TRANSFER, PLEDGE, HYPOTHECATION OR OTHER DISPOSITION OF ANY OF SAID PARTICIPATION SHARES IS RESTRICTED AND MAY NOT BE ACCOMPLISHED EXCEPT IN ACCORDANCE WITH SUCH INVESTMENT REPRESENTATION AND THIS AGREEMENT.

This Agreement is executed as of September 13, 1985, by and between RKO PICTURES, INC. ("RKO") and the following seven individuals (referred to herein individually as "Investor" and collectively as "Investors"): Les Barkley, Michael Barkley, Tim Hayes, Thorn Huffman, Kathy Maher, Ron Kubota, Ronald Nelson and Michael R. Lombardi; with reference to the following facts:

A. RKO is the owner of certain distribution rights in and to the motion picture ("Picture") presently entitled "Plenty," based on a play entitled "Plenty" by David Hare, starring Meryl Streep, Sting, Charles Dance, and Sam Neill, and directed by Fed Schepisi.

B. Pursuant to that certain memorandum agreement dated June 20, 1984 (revised June 27, 1984) between RKO and Twentieth Century Fox Film Corporation ("Fox") (which is hereinafter referred to as the "Fox Agreement") RKO licensed certain theatrical and non-theatrical (excluding television and videogram) distribution rights in the Picture in the

* * *

and not through any form of general advertising or solicitation such as advertisements or other communications in newspapers, magazines or other media, broadcasts on radio or television, seminars or promotional meetings or other generally circulated letter, circular or other written communication.

(g) Such Investor has not been furnished any information by RKO or any of their affiliates, associates or agents other than this Agreement and any information described in subparagraph (e) above.

(h) All of the information which such investor has heretofore furnished to RKO or which is set forth herein is correct and complete as of the date of this Agreement.

15. (a) Neither this Agreement nor any provision hereof may be changed, waived, modified, rescinded, released, amended, discharged or terminated orally,

except by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought.

(b) If the investors breach any of their material obligations under this Agreement, then, without limitation of RKO's rights and remedies, all of which are expressly reserved, the Investors, jointly and severally, hereby agree to pay upon demand all costs and expenses incurred by RKO in enforcing this Agreement, and in realizing upon the Letter of Credit and enforcing RKO's rights hereunder, including without limitation, if RKO retains counsel for any such purpose, its attorneys' fees actually incurred, together with interest on such costs, expense and attorneys' fees at the maximum rate permitted by applicable law form the date incurred until paid. The issue of whether or not a breach has occurred for purposes of this subparagraph (b), if disputed by the Investors, shall be determined in accordance with subparagraphs 14(g) and (h) below.

(c) Time is of the essence hereof.

(d) In case any one or more of the provisions contained in this Agreement shall be held invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

(e) This Agreement will be binding upon and inure to the benefit of RKO and its respective successors, assignment of this Agreement by RKO, RKO shall remain liable here under unless such assignment is to Fox or to a

company affiliated with RKO or Fox; and provided further that RKO may not assign the Letter of Credit to any person or company except to a "permitted transferee" (as defined in the Letter of Credit). RKO agrees not to assign this Agreement or the Letter of Credit to Fox unless Fox agrees that the Investors will have all rights with respect to the Shortfall as RKO would have if the Agreement or Letter of Credit were not assigned to Fox. This Agreement is not assignable by the investors and any purported such assignment will be null and void from the making thereof.

(f) All notices, payments and other communications hereunder shall be in writing and shall be delivered personally or deposited in the United States mail, postage prepaid, addressed as follows: if to the Investor, to Michael R. Lombardi, as Trustee for RKO "Plenty" Syndicate, c/o Pacific Capital Investors, 1148 Fourth Street, Santa Monica, California 90403, with a courtesy copy to O'Melveny & Myers, 1800 Century Park East, Los Angeles, California 90067, Attention: Gregory Paul, Esq.; or if to RKO, 1900 Avenue of the Stars, Los Angeles, California 90067, with a courtesy copy to Loeb & Loeb, 10100 Santa Monica Boulevard, Suite 2200, Los Angeles, California 90067. Attention: Glenn C. Schroeder. Esq. Any notice so addressed and sent by mail shall be deemed to have been given when mailed.

(g) In the event that at any time during the continuance of this Agreement or at any time thereafter any doubt, difference, question or dispute whatsoever should arise between any of the parties hereto whether in relation to the interpretation of this Agreement or to any of the respective rights and obligations of any of the

parties hereto under this Agreement or to any act or omission of any of the parties hereto or to any matter or thing whatsoever relating to the subject matter of this Agreement or arising out of or concerning the relationship between the parties hereto constituted by or dealt with in this Agreement than such doubt, difference, question or dispute shall be referred to determination for arbitration before a single arbitrator who shall be familiar with the motion picture industry, the identity of whom shall be agreed upon between the parties hereto. The award of the arbitrator under such an arbitration shall be final and binding upon the parties hereto. Such arbitration shall occur in Los Angeles, California, and shall be conducted in accordance with the then applicable rules and procedures of the American Arbitration Association.

(h) The prevailing party in any arbitration or lawsuit hereunder shall be entitled to recover its attorneys' fees and expenses, in addition to whatever other damages may be awarded. The characterization of one party, if any, as "prevailing" shall, for the purposes hereof, be made by the arbitrator or Court, as the case may be.

(i) This Agreement reflects and constitutes the complete understanding and agreement of the parties hereto with respect to the subject matter hereof, and supersedes any and all prior understandings and agreements relating thereto.

(j) This Agreement may be executed in counterparts, each of which shall be deemed to be an original and which together shall constitute one and the same instrument.

(k) This Agreement shall be construed and enforced in accordance with the laws of the State of California applicable to agreements executed and fully performed therein, and the parties hereto hereby agree to submit to the exclusive jurisdiction of the United States District Court for the Central District of California or the Los Angeles County Superior Court of the State of California which the parties hereto acknowledge and agree are convenient forums to litigate such action. The parties waive any right to transfer such action to any other court and expressly consent to the permanent jurisdiction in the State of California with respect to the resolution of any disputes hereunder and agree to be bound by the judgment rendered by such courts. In this regard, each of the Investors hereby appoints Gregory Paul, Esq., O'Melveny & Myers, 1800 Century Park East, Los Angeles, California 90067, or if he is not reasonable available the Secretary of State of the State of California, to accept service of process for him or her in connection with any matters arising hereunder.

16. EACH PARTY HERETO HAS BEEN ADVISED TO SEEK THE OPINION OF HIS OR HER OR ITS SEPARATE LEGAL COUNSEL REGARDING THIS AGREEMENT, AND HAS DONE SO.

17. Upon the execution hereof, to evidence and secure the Investor's obligations hereunder, the Investors shall execute and deliver to RKO a non-interest-bearing demand promissory note (the "Note") in favor of RKO in the amount of $3,500,000. The Note shall be in the form of Exhibit "B", which is attached hereto and made a part hereof by this reference. The Note may be executed in counterparts. If and when the Investors deliver the Letter

counterparts. If and when the Investors deliver the Letter of Credit to

* * *

occurs, RKO shall pay all funds contained in said account (including interest, if any, earned on said account), less an amount equal to RKO's actual expenses in negotiating the Note and establishing said account, to the Investors.

THIS AGREEMENT is executed as of the day and year first above mentioned.

RKO PICTURES, INC.

By _____

/s/ Michael Barkley
Michael Barkley

Ron Kubota

Tim Hayes

Michael R. Lombardi

Thorn Huffman

Ronald Nelson

Kathy Maher

Les Barkley

APPENDIX F

BARKLEY, RODOLF, WHITE & HARTMAN
ATTORNEYS AT LAW
410 ONEOK PLAZA
100 WEST 5TH STREET
TULSA, OKLAHOMA 74103
(918) 599-9991

MICHAEL BARKLEY*
STEPHEN H. RODOLF
JAY B. WHITE**
ANDREW S. HARTMAN*
SANDRA F. RODOLF
JOHN D. CLAYMAN
DENISE G. HARTMAN

---

* A PROFESSIONAL CORPORATION
** ADMITTED ALSO TO KANSAS BAR

January 7, 1987

Mr. Albert F. Smith
Loeb and Loeb
One Wilshire Building, 16th Floor
Wilshire Boulevard at Grand Avenue
Los Angeles, CA 90017

Dear Mr. Smith:

I am in receipt of your demand for arbitration letter dated November 14, 1986. This was forwarded to me by Mr. Michael Lombardi, investor and Trustee for RKO (Plenty) Syndicate.

I have reviewed your correspondence as well as the Agreement of September 13, 1985 by and between RKO and eight individual investors. It is my understanding that Mr. Thorn Huffman is no longer considered viable

concerning this Agreement by virtue of his current financial status.

It has been represented to me that the Agreement of September 13, 1985 encompassed the voluminous Agreement between RKO and Twentieth Century Fox concerning the distribution of the movie "Plenty". By virtue of the fact that the Agreement between Twentieth Century/ RKO was incorporated into the September 13, 1985 Agreement between RKO and the individual investors, I do not want to make a decision concerning arbitration at this time without having the benefit of fully and completely reviewing this voluminous document. Therefore, would you promptly forward to me the Twentieth Century Fox/RKO Agreement so that I can completely review that contract and make an intelligent decision concerning arbitration in this case.

This letter is not intended to delay this matter, but is intended to fully inform this investor as to all the pertinent facts involving the dispute arising herein.

I look forward to a prompt reply.

Very truly yours,

/s/ Mike Barkley
Mike Barkley

MB:cw
cc: Mr. Michael R. Lombardi

APPENDIX G

ALBERT F. SMITH, P.C.
LOEB AND LOEB
1000 Wilshire Boulevard, Suite 1800
Los Angeles, California 90017
Telephone: (213) 688-3594

Attorneys for Petitioner
RKO Pictures, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In the Matter of the Arbitration between RKO PICTURES, INC., a corporation, Petitioner, and MICHAEL R. LOMBARDI, individually and as Trustee for RKO "Plenty" Syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA and RONALD NELSON, Respondents.	No. C 650 705 JUDGMENT IN CONFORMITY WITH ARBITRATION AWARD [C.C.P. § 1287.4] (Filed Mar. 7, 1988)

The petition of RKO PICTURES, INC. for an Order confirming an Arbitration Award and for entry of Judgment in conformity with said Arbitration Award came on regularly for hearing before Department 35 on this Court

on February 8, 1988. Petitioner RKO PICTURES, INC. appeared by its counsel Loeb and Loeb, by Albert F. Smith, Esq. No appearance was made on behalf of Respondents MICHAEL R. LOMBARDI, LES BARKLEY, MICHAEL BARKLEY, TIM HAYES, KATHY MAHER, RON KUBOTA OR RONALD NELSON, and no papers were filed by Respondents or any of them in response to the said petition.

Proof having been made to the satisfaction of the Court that the petition should be granted, and good cause appearing therefor, and the Court having directed that Judgment be entered in conformity with the Award of Arbitrator Leon Kaplan dated October 14, 1987,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Petitioner RKO PICTURES, INC. recover from Respondents MICHAEL LOMBARDI, LES BARKLEY, MICHAEL BARKLEY, TIM HAYES, KATHY MAHER, RON KUBOTA and RONALD NELSON, jointly and severally, the principal sum of $666,885, together with interest thereon at the rate of ten (10) per cent per annum from March 25, 1987 to the date hereof in the sum of $62,851.80, to date of ___ for a total sum of $729,736.80, and attorneys' fees, as determined by the Arbitrator, in the sum of $27,652.

Dated: 3/7/88

/s/ Illegible
Judge of the Superior Court

PROOF OF SERVICE

I declare that I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within cause. My business address is 1000 Wilshire Boulevard, Suite 1800, Los Angeles, California 90017.

On February 9, 1988, I served the within JUDGMENT IN CONFORMITY WITH ARBITRATION AWARD [C.C.P. § 1287.4] on the respondents herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Gregory Paul, Esq.
1901 Avenue of the Stars
Suite 1600
Los Angeles, CA 90067

Frank W. Nemecek, Esq.
Nemecek & Cole
920 American Savings Plaza
15260 Ventura Boulevard
Sherman Oaks, CA 91403-5399

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 9, 1988 at Los Angeles, California.

/s/ Joan M. Washington
Joan M. Washington

Official Capacity
Exemplified Copy

RKO PICTURES, INC., VS. MICHAEL R. LOMBARDI

C 650 705

STATE OF CALIFORNIA
County of Los Angeles

I, FRANK S. ZOLIN, County Clerk/ Executive Officer of the Superior Court, of the State of California for the County of Los Angeles, do hereby certify and attest the foregoing to be a full, true and correct copy of the original Judgment In Conformity With Arbitration Award [C.C.P. § 1287.4]; filed March 7, 1988; on file or of record in my office, and that I have carefully compared the same with the original.

Executed and Seal of the Said Superior Court
Affixed at Los Angeles, California.
June 8, 1988

/s/ Frank S. Zolin
County Clerk/Executive Officer of the Superior Court of California, County of Los Angeles.

STATE OF CALIFORNIA
County of Los Angeles

I, RICHARD P. BYRNE, Presiding Judge of the Superior Court of the State of California for the County of Los Angeles do hereby certify that FRANK S. ZOLIN is County Clerk/Executive Officer of the Superior Court of California, County of Los Angeles (which is a court of

record, having a seal); that the signature of the foregoing certificate and attestation is the genuine signature of the said FRANK S. ZOLIN as such officer; that the seal annexed thereto is the seal of said Superior Court, that said FRANK S. ZOLIN as such Clerk is the legal custodian of the original records or documents described and referred to in the foregoing certificate; is the proper officer to execute the said certificate and attestation, and such attestation is in due form according to the laws of the State of California.

Executed at Los Angeles, California.

June 8, 1988

/s/ Richard P. Byrne
Presiding Judge of the Superior Court of the State of California, County of Los Angeles

STATE OF CALIFORNIA
County of Los Angeles

I, FRANK S. ZOLIN, County Clerk/Executive Officer of the Superior Court, County of Los Angeles, State of California (which is a court of record having a seal which is annexed hereto), do hereby certify that RICHARD P. BYRNE, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing same, Presiding Judge of the Superior Court aforesaid and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the

signature of the Judge above named to said certificate of due attestation is genuine.

(Seal)

Executed and Seal of the Said Superior Court Affixed
at Los Angeles, California.
June 8, 1988

/s/ Frank S. Zolin
County Clerk/Executive Officer of the Superior Court of California, County of Los Angeles.

(U.S. Code (1958) Title 28; Section 1738-State and Territorial Statistics and Judicial proceedings, full faith and credit.)

APPENDIX H

IN THE DISTRICT COURT OF TULSA COUNTY,
STATE OF OKLAHOMA

Case No. CJ 88 3802

(Filed June 20, 1988)

NOTICE OF FILING OF FOREIGN JUDGMENT

To the Judgment Debtor: Michael Barkley
410 Oneok Plaza
100 W. 5th St.
Tulsa, OK 74103

YOU ARE HEREBY NOTIFIED that on the 20 day of June, 1988, there was filed in the office of the Court Clerk of Tulsa County, Oklahoma, a copy of a judgment, duly authenticated, entered in the Superior Court of Los Angles [sic] County, State of Califoria [sic], Case No. C-650-705, styled:

RKO vs Lombardi et. al.

The name and address of the judgment creditor is:

RKO Pictures
c/o T.A. Mann
3314 E. 51st
Suite 218MM
Tulsa, OK 74136

The name and address of the lawyer for the judgment creditor in the State of Oklahoma is:

T.A. Mann
3314 E. 51st, Suite 218MM
Tulsa, OK 74136
Dated this 20th day of June, 1988.

DON E. AUSTIN, Court Clerk

By /s/ Illegible
Deputy

(SEAL)

APPENDIX I

IN THE DISTRICT COURT WITHIN AND
FOR TULSA COUNTY STATE OF OKLAHOMA

In the Matter of the Arbitration between RKO PICTURES, INC., a corporation Plaintiff, v. MICHAEL R. LOMBARDI, individually and as Trustee for RKO "Plenty" Syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA and RONALD NELSON, Defendants.	)	No. CJ-88-3802 (Filed July 11, 1989)

ANSWER AND OBJECTION TO NOTICE OF FILING OF FOREIGN JUDGMENT

Defendants Michael Barkley and Tim Hayes respectfully submit this Answer and Objection to the Notice of Filing of Foreign Judgment rendered in the above-entitled action. As grounds for their objection, Defendants would state that the action in which the supposed judgment against them was alleged to have been recovered arose on an alleged contract, and was *in personam* against them.

At the time that the above-entitled action was commenced in the foreign jurisdiction, these Defendants were residents of the State of Oklahoma and were not residents of the State of California. Neither Defendant appeared in

that arbitration proceeding, and neither was personally served in the State of Oklahoma, or elsewhere, with summons therein. Consequently, Defendants believe that the Court in the action did not acquire jurisdiction over them at any time, and the foreign judgment filed herein is invalid and void as to each pursuant to 12 Okla. Stat. 1981 § 713(a)(2).

RKO failed at any time to provide these Defendants with legal personal notice of the process concerning the arbitration proceedings. RKO's denial of due process prohibited these Defendants from challenging the personal jurisdiction of the California Court. This will be the first opportunity these Defendants have had to contest the jurisdiction of the California Court to grant its judgment. Consequently, Defendants believe that the foreign judgment should not be recognized by this Court pursuant to the terms of 12 Okla. Stat. 1981 § 713(b)(1).

Defendants would further request that this Court act pursuant to 12 Okla. Stat. 715 to stay any action on the foreign judgment. Defendants are in the process of prosecuting an appeal on the foreign judgment.

In conjunction with this Answer and Objection to Notice of Filing Foreign Judgment, Defendants respectfully submit their Memorandum Brief in support.

WHEREFORE, premises considered, Defendants respectfully request that the foreign judgment filed herein not be recognized by this Court on the grounds of lack of personal jurisdiction over the Defendants; lack of notice being provided to these Defendants, and

additionally, a stay in this mattter pending the prosecution of the appeal.

Respectfully submitted,
/s/ John D. Clayman
John D. Clayman
BARKLEY, RODOLF, SILVA & McCARTHY
410 Oneok Plaza
100 West 5th Street
Tulsa, OK 74103
(918) 599-9991
ATTORNEYS FOR DEFENDANTS
MICHAEL BARKLEY AND
TIM HAYES

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above an foregoing document was mailed on this 11th day of July, 1988, with proper postage thereon fully prepaid to:

Thomas A. Mann
3314 East 51st Street
Suite 218MM
Tulsa, OK 74136

/s/ John D. Clayman

IN THE DISTRICT COURT WITHIN AND
FOR TULSA COUNTY STATE OF OKLAHOMA

In the Matter of the Arbitration between RKO PICTURES, INC., a corporation, Plaintiff, v. MICHAEL R. LOMBARDI, individually and as Trustee for RKO "Plenty" Syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA and RONALD NELSON, Defendants.	)	No. CJ-88-3802 (Filed July 11, 1988)

MEMORANDUM BRIEF IN SUPPORT OF ANSWER AND OBJECTION TO NOTICE OF FILING OF FOREIGN JUDGMENT

Plaintiff in this matter has filed with this Court a judgment obtained in the State of California for purposes of having the foreign judgment recognized within this jurisdiction. Defendant Michael Barkley ("Barkley") and Defendant Tim Hayes ("Hayes") respectfully object to the filing of the foreign judgment based upon statutorily enumerated grounds.

This Brief will establish that the foreign judgment filed in this Court should not be recognized and should be stayed pending the prosecution of an appeal to vacate the judgment rendered in the foreign jurisdiction.

I.

BACKGROUND OVERVIEW

Defendant Barkley and Defendant Hayes were among several investors that participated in the syndication and distribution of the motion picture "Plenty." Hayes and Barkley entered into an agreement with Plaintiff on or about September 13, 1985 (the "Agreement") to provide funds which might be required to meet RKO's obligation to the motion picture distributor for potential expense deficits in the distribution of the film.

At the time of their decision to invest in the syndication and distribution of the movie, Barkley and Hayes were residents of the State of Oklahoma. The alleged agreement which is the subject of the foreign judgment was executed by Barkley and Hayes in the State of Oklahoma. At no time did either Barkley or Hayes venture to California for any reason related to their investment in the syndication and distribution of the motion picture. Neither Barkley nor Hayes appeared in the arbitration proceeding, and neither was ever personally served in the State of California, or elsewhere, with summons related to the arbitration or confirmation of the arbitration proceeding.

The distribution of the motion picture was materially different than what was represented in the Agreement to be the distribution medium. Barkley and Hayes were repeatedly informed prior to the execution of the agreement that a shortfall liability on the distribution of the film was unlikely given the stature of the motion picture and its cast, as well as the distribution medium planned within the Agreement. The subsequent change in the distribution medium of the motion picture was a material

departure from the Agreement which resulted in a shortfall liability beyond that represented in the Agreement or by the syndicate promoters.

The judgment which is filed in this jurisdiction for recognition arises from an arbitrator's decision in the State of California. On July 6, 1987, the Superior Court of the State of California, County of Los Angeles, in Case No. C-650705, issued an Order granting the Motion of Plaintiff for an Order compelling the investors, which included Hayes and Barkley, to participate in arbitration of the controversy relating to the shortfall liability. Inasmuch as the Agreement purports to contain material misrepresentations, provisions dealing with consent to arbitration would appear to be questionable. Aside from the validity of the provisions dealing with arbitration, RKO failed at any time to personally notify Barkley and Hayes of the arbitration proceedings. This Court has provided Barkley and Hayes their first opportunity to challenge the asserted jurisdiction of the California Court. Lacking personal notice of the arbitration proceeding, Barkley and Hayes lost any possibility of defending in the foreign Court.

II.

FACTS

1. Both Hayes and Barkley are currently and have been for all relevant times related to the foreign judgment filed herein residents of the State of Oklahoma.[1]

---

[1] See Affidavits of C. Michael Barkley and Tim Hayes attached hereto as Exhibits "A" and "B" respectively at paragraph 2.

2. The purported contract which is the subject of the foreign judgment was executed by Barkley and Hayes in the State of Oklahoma. At no time did either Barkley or Hayes venture to California for any purpose related to the purported contract.[2]

3. Barkley and Hayes have never appeared in nor was either personally served in the State of California, or elsewhere, with summons related to the foreign judgment which has been filed herein.[3]

4. Barkley and Hayes were not provided any personal notice by RKO of the legal proceedings related to the foreign judgment filed herein to allow them to challenge the personal jurisdiction of the California Court concerning the purported contract.[4]

5. Neither Barkley or Hayes has had any previous opportunity to challenge the foreign judgment.[5]

---

[2] See Affidavits of C. Michael Barkley and Tim Hayes attached hereto as Exhibits "A" and "B" respectively at paragraph 3.

[3] See Affidavits of C. Michael Barkley and Tim Hayes attached hereto as Exhibits "A" and "B" respectively at paragraph 4.

[4] See Affidavits of C. Michael Barkley and Tim Hayes attached hereto as Exhibits "A" and "B" respectively at paragraph 5.

[5] See Affidavits of C. Michael Barkley and Tim Hayes attached hereto as Exhibits "A" and "B" respectively at paragraph 6.

6. Barkley and Hayes have engaged Murray Abowitz, Esq. of the firm of Abowitz & Welch, to represent them in the appeal and vacation of the foreign judgment which has been filed herein.[6]

7. Mr. Abowitz has informed Barkley and Hayes that he is in the process of preparing necessary documents in the prosecution of the appeal and vacation of the foreign judgment which has been filed herein.[7]

III.

ARGUMENTS AND AUTHORITIES

The State of Oklahoma has adopted the Uniform Foreign Money-Judgment Recognition Act as codified at 12 Okla. Stat. 1981 §§ 710-26. The general rule provided within the Act is that foreign judgments are enforceable in the same manner as the judgment which was rendered in the foreign state. See 12 Okla. Stat. 1981 § 712. In other words, the judgment of the foreign jurisdiction is entitled to full faith and credit pursuant to the laws of the Constitution.

The general rule is not without its limitations. 12 Okla. Stat. 1981 § 713 enumerates several grounds upon which a foreign judgment can be denied recognition. The

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[6] See Affidavits of C. Michael Barkley and Tim Hayes attached hereto as Exhibits "A" and "B" respectively at paragraph 7.

[7] See Affidavits of C. Michael Barkley and Tim Hayes attached hereto as Exhibits "A" and "B" respectively at paragraph 8.

provisions which are applicable to the situation which is presently before this Court are found as follows:

> (a) A foreign judgment is not conclusive if
>
> (2) The foreign court did not have personal jurisdiction over the defendant;
>
> * * *
>
> (b) A foreign judgment need not be recognized if
>
> (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> * * *

The arbitration proceedings which became the subject of the foreign judgment were conducted without the presence of either Barkley or Hayes. Neither of these Defendants was personally notified by RKO of the nature of the arbitration proceedings. Sufficient notice would have granted Barkley and Hayes the opportunity to establish their defenses which include the lack of personal jurisdiction of the California Court given the fraudulent representations of the Agreement.

Plaintiff, by ignoring Barkley's and Hayes's right to personal notification of the arbitration proceedings, has deprived these Defendants their due process and ignored any principle of fairness. Lack of personal notification in this instance is especially significant given that neither Barkley nor Hayes have any ties whatsoever to the State of California.

As the United States Supreme Court has recognized, the "due process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations'." *Burger King Corp. v. Rudzewicz,* 105 S.Ct. 2174, 2181-2 (1985).

The jurisdiction of the forum Court, California, is certainly subject to question given the misrepresentations present in the Agreement which purports to confer jurisdiction to the State of California. The nature of Barkley's and Hayes's involvement in this transaction presents significant questions as to whether their contacts with the State of California were enough to confer personal jurisdiction to that Court. The United States Supreme Court has heid that:

> The defendant's contacts with the forum state must be such that maintenance of the suit 'does not offend traditional notions of fair play and substantial justice'.

International Shoe Company v. Washington, 66 S.Ct. 154 (1945).

Only now have Barkley and Hayes been given the opportunity to challenge the judgment of the California Court based on lack of personal jurisdiction and the deprivation of their due process rights. Pursuant to the provisions of 12 Okla. Stat. §§ 713(a)(2) and 713(b)(1), Barkley and Hayes would respectfully request that this Court not recognize the foreign judgment which has been filed herein.

In the event that this Court deems the foreign judgment which has been filed to be enforceable. Barkley and

Hayes would request that this Court exercise its judicial powers pursuant to 12 Okla. Stat. 1981 § 715 to stay the enforcement proceedings of the foreign judgment. Section 715 provides:

> If the defendant satisfied the court either that an appeal is pending or that he is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal.

At this time, Barkley and Hayes have retained the services of Murray Abowitz of the firm of Abowitz & Welch to prosecute the appeal of this judgment in an effort to vacate the award. At this time, attorney Abowitz is in the process of preparing the necessary legal documents to prosecute the appeal. Under the terms of § 715, this Court has the judicial power to stay the proceedings. A stay by this Court would be especially appropriate in light of the circumstances which gave rise to the foreign judgment.

IV.

CONCLUSION

Plaintiff seeks the recognition of a foreign judgment rendered in a form which did not have jurisdiction over Defendant Michael Barkley or Defendant Tim Hayes. Further, these Defendants did not receive notice of the proceedings held in the foreign jurisdiction within sufficient time to enable them to defend their rights. The failure to notify these Defendants, coupled with these Defendants'

lack of contact with the State of California, provides this Court with sufficient grounds not to recognize the foreign judgment.

Finally, the circumstances which gave rise to this foreign judgment will be the subject of an appeal which is presently being prosecuted by counsel retained by these Defendants. Accordingly, a stay in these proceedings until the appeal has been determined is warranted.

Respectfully submitted,

John D. Clayman
John D. Clayman
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(918) 599-9991

ATTORNEYS FOR DEFENDANTS MICHAEL BARKLEY AND TIM HAYES

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing document was mailed on this 11th day of July, 1988, with proper postage thereon fully prepaid, to:

Thomas A. Mann
3314 East 51st Street
Suite 218MM
Tulsa, OK 74136

/s/ John D. Clayman

EXHIBIT A

IN THE DISTRICT COURT WITHIN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

In the Matter of the Arbitration between RKO PICTURES, INC., a corporation, Plaintiff, v. MICHAEL R. LOMBARDI, individually and as Trustee for RKO "Plenty" Syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA and RONALD NELSON, Defendants.	)	No. CJ-88-3802

AFFIDAVIT OF C. MICHAEL BARKLEY

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

C. MICHAEL BARKLEY, upon being sworn and apprised as to the oath, states as follows:

1. I am an adult over the age of twenty-one and am fully competent to execute this Affidavit.

2. I am currently and have been for all relevant times related to the foreign judgment filed herein a resident of the State of Oklahoma.

3. The purported contract which is the subject of the foreign judgment was executed by me in the State of Oklahoma. At no time did I venture to California for any purpose related to the purported contract.

4. I have never appeared in nor was I personally served in the State of California, or elsewhere, with summons related to the foreign judgment which has been filed herein.

5. I was not provided any personal notice by RKO of the legal proceedings related to the foreign judgment filed herein to permit me to defend against the personal jurisdiction of the California Court.

6. This will be my first opportunity to defend against the judgment rendered in the California Court.

7. At this time, I have engaged Murray Abowitz, Esq., of the firm of Abowitz & Welch, to represent me in the appeal and vacation of the foreign judgment which has been filed herein.

8. Mr. Abowitz has informed me that he is the process of preparing necessary documents in the prosecution of the appeal and vacation of the foreign judgment which has been filed herein.

FURTHER AFFIANT SAITH NOT.

/s/ C. Michael Barkley
C. MICHAEL BARKLEY

SUBSCRIBED AND SWORN to before me this 11th day of July, 1988.

/s/ Camme White
Notary Public

My commission expires:
December 23, 1989

EXHIBIT B

OBA#11790

IN THE DISTRICT COURT WITHIN AND
FOR TULSA COUNTY
STATE OF OKLAHOMA

In the Matter of the Arbitration between RKO PICTURES, INC., a corporation, Plaintiff, v. MICHAEL R. LOMBARDI, individually and as Trustee for RKO "Plenty" Syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA and RONALD NELSON, Defendants.	)	No. CJ-88-3802

AFFIDAVIT OF TIM HAYES

STATE OF OKLAHOMA)
) SS.
COUNTY OF TULSA)

TIM HAYES, upon being sworn and apprised as to the oath, states as follows:

1. I am an adult over the age of twenty-one and am fully competent to execute this Affidavit.

2. I am currently and have been for all relevant times related to the foreign judgment filed herein a resident of the State of Oklahoma.

3. The purported contract which is the subject of the foreign judgment was executed by me in the State of Oklahoma. At no time did I venture to California for any purpose related to the purported contract.

4. I have never appeared in nor was I personally served in the State of California, or elsewhere, with summons related to the foreign judgment which has been filed herein.

5. I was not provided any personal notice by RKO of the legal proceedings related to the foreign judgment filed herein to permit me to defend against the personal jurisdiction of the California Court.

6. This will be my first opportunity to defend against the judgment rendered in the California Court.

7. At this time, I have engaged Murray Abowitz, Esq., of the firm of Abowitz Welch, to represent me in the appeal and vacation of the foreign judgment which has been filed herein.

8. Mr. Abowitz has informed me that he is in the process of preparing necessary documents in the prosecution of the appeal and vacation of the foreign judgment which has been filed herein.

FURTHER AFFIANT SAITH NOT.

/s/ Tim Hayes
Tim Hayes

SUBSCRIBED AND SWORN to before me this 11th day of July, 1988.

/s/ Camme White
Notary Public

My commission expires:
December 23, 1989

APPENDIX J

IN THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

DIVISION III

IN THE MATTER OF THE ARBITRATION BETWEEN RKO PICTURES, INC. a corporation,	§	Supreme Court 75,649
Appellant/Plaintiff,	§	
vs.	§	District Court Case No. CJ-88-3802
MICHAEL P. LOMBARDI, individually, and as Trustee for RKO "Plenty" syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA; and RONALD NELSON,	§	
Appellees/Defendants.	§	

APPELLEE'S MICHAEL BARKLEY'S PETITION FOR REHEARING

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March 13, 1992

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1 Moore's Federal Practice, ¶4.12 n.7 (1989) 8

J. Friedenthal, M. Kane, A. Miller, Civil Procedure (1985) 3, 9

IN THE COURT OF APPEALS
OF THE STATE OF OKLAHOMA

DIVISION III

IN THE MATTER OF THE ARBITRATION BETWEEN RKO PICTURES, INC. a corporation, Appellant/Plaintiff, vs. MICHAEL P. LOMBARDI, individually, and as Trustee for RKO "Plenty" syndicate; LES BARKLEY; MICHAEL BARKLEY; TIM HAYES; KATHY MAHER; RON KUBOTA; and RONALD NELSON, Appellees/Defendants.	§	Supreme Court 75,649 District Court Case No. CJ-88-3802

APPELLEE'S MICHAEL BARKLEY'S
PETITION FOR REHEARING

Appellee Michael Barkley ("Barkley") respectfully submits his Petition for Rehearing pursuant to Rule 3.9 of the Rules on Practice and Procedure in the Court of Appeals and on Certiorari to that Court.

I. INTRODUCTION

Reconsideration of a decision already reached is time consuming and undoubtedly, burdensome, yet the precedential impact of this decision, which denies Barkley his constitutional right to due process, compels him to request a rehearing by this Court. Against difficult odds, Barkley must convince this Court of the compelling need to reconsider its decision of February 24, 1992, vacating the judgment of the Trial Court and reinstating the foreign judgment in favor of RKO. While Barkley recognizes the conscientious effort by this Court to reach a fair and just decision, the critical issues and principles addressed by this Court in its decision, as well as the far reaching ramifications of that decision, strongly merit a reconsideration of the Court's opinion.

Against the weight of constitutional authority, this Court determined as a matter of law that a party is not entitled to actual notice of a pending action. Far more is at stake in this decision than the impact of the opinion on these particular litigants. The decision, as it now stands, radically departs from previously known boundaries of due process. The Petition for Rehearing grants the Court an opportunity to reconsider its decision and reestablish long standing principles of due process.

II.

ARGUMENTS AND AUTHORITIES

A. The Court's Reliance On *PENNOYER vs. NEFF* Is Fundamentally Flawed.

In its opinion, the Court improperly adopts the holding of *Green Mountain v. Levine*, 139 A.2d 822 (Vt. 1958). In its opinion, the Court recognized that the Vermont court in *Green Mountain* relied on the United States Supreme Court decision of *Pennoyer vs. Neff*, 95 U.S. 714 (1877), in reaching its decision that the defendants were afforded due process.

A review of cases which have cited *Pennoyer vs. Neff* show that this decision was overruled by the United States Supreme Court in *Shaffer vs. Heitner*, 433 U.S. 186, 212 n.39, 97 S.Ct. 2569, 2584, n. 38, 53 L.Ed.2d 683 (1977). In *Shaffer vs. Heitner*, the United States rejected the outdated due process principles enumerated in *Pennoyer vs. Neff*.

> It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. ***To the extent that prior decisions are inconsistent with this standard, they are overruled.*** (emphasis supplied).

Shaffer vs. Heitner, 433 at 212 n.39, 97 S.Ct. at 2584, n. 39.

> . . . the *Shaffer* opinion proclaims the triumph of a *general* theory of state court jurisdiction based on *International Shoe*, ***which displaces rather than supplements the barnacled conceptual structure of Pennoyer v. Neff.***

J. Friedenthal, M. Kane, A. Miller, Civil Procedure 148-151 (1985).

The Court's adoption of *Green Mountain* is premised on a United States Supreme Court decision which no longer represents the existing law on issues of in personam jurisdiction. *Green Mountain* predates the *Shaffer vs. Heitner* decision by exactly twenty years. *Green Mountain* has not been cited by a federal court since the decision rendered by the United States Supreme Court in *Shaffer vs. Heitner,* and *Green Mountain* decision has been followed only once in the past twenty-eight years. Significantly, the *Green Mountain* decision is some six years prior to the United States Supreme Court decision in *Szuhkent.* Also, the defendants did not contend that they had been denied actual notice of the legal proceedings in Vermont. The defendants made a special appearance solely to question the jurisdiction of the court. *Green Mountain,* 139 A.2d at 823. Remarkably, this Court has embraced a decision based upon antiquated notions of due process. For this reason alone, the ruling needs to be reviewed to insure that the opinion is in conformity with existing constitutional notions of due process.

B. The Court's Decision is Inconsistent with Oklahoma Supreme Court Decisions.

Unfortunately, the parties had completed briefing the issues in this appeal prior to the publication of *Graff vs. Kelly,* 814 P.2d 489 (Okla. 1991). As a consequence, this Court did not have the benefit of being apprised of the Oklahoma Supreme Court's ruling with respect to the constitutional issues raised in *Graff vs. Kelly.*

In *Graff*, a medical clinic sued a former physician for breach of contract and conversion. The plaintiff served the physician's receptionist at the defendant's business address. 814 P.2d at 491. The trial court entered a default judgment against the defendant finding that he had been served at his business and had failed to answer the summons. The defendant filed a petition to vacate the judgment based upon defective service of process which was denied by the trial court. The Court of Appeals affirmed the trial court's ruling on the grounds that the defendant did not deny that he received actual notice. 814 P.2d at 492. The Oklahoma Supreme Court granted certiorari and reversed the decision of the Court of Appeals, granting the defendant's motion to vacate the judgment. 814 P.2d at 496.

In rendering its ruling in *Graff*, the Oklahoma Supreme Court noted that "[a]ctual notice cannot by itself be sufficient to establish in personam jurisdiction." 814 P.2d at 492, 493. In the present case, the Trial Court specifically found that there was no actual notice, so the basic elements of in personam jurisdiction were not satisfied. Applying our Supreme Court's logic, if actual notice does not satisfy in personam jurisdiction, then mere service should not. Service and communication of the notice are the prerequisites for in personam jurisdiction.

In *Graff*, the Oklahoma Supreme Court restated its test to determine the legitimacy of a substituted service of process method as a means to establish in personam jurisdiction as follows:

> This Court held in *Steincamp v. Steincamp*, 593 P.2d 495, 498 (Okla. 1979), that in determining the sufficiency of substituted service of process,

> three questions must be answered: "(1) Is there a statute authorizing the method of service employed?; (2) Have the requirements of the statute been observed?; (3) Have fundamental due process requirements been met?"

Graff vs. Kelly, 814 P.2d at 493.

The Oklahoma Supreme Court recognized that a principal can appoint an agent to receive service of process. The Oklahoma Supreme Court cited *National Equipment Rental, Ltd. v. Szuhkent,* 375 U.S. 311, 84 S.Ct. 411, 11 L.E.2d 354 (1964). Our Supreme Court analyzed the holding of the United States Supreme Court as to constitutional sufficiency of substituted service of process as follows:

> The [United States Supreme] Court held that because the defendants had contractually agreed to appoint the New York resident as service agent ***and had actually received the process papers promptly upon service of the agent, the service of process was valid.*** (emphasis supplied).

Graff vs. Kelly, 814 P.2d at 494.

Under our own Supreme Court's interpretation of *Szuhkent,* substituted service of process on a contractually appointed agent will survive constitutional scrutiny only if there is evidence that the principal "actually received the process papers promptly upon service of the agent." *Id.* While Barkley has not disputed the appointment of the agent in the Investor Agreement, the Trial Court found that Barkley never received the process papers and had no notice of the California proceedings. Consequently, under our own Supreme Court's reasoning, the

Trial Court was correct in its determination that the service of process employed by RKO was invalid and that California lacked in personam jurisdiction over Barkley.

This Court's analysis in finding that California had a personam jurisdiction over Barkley completely ignores the third prong of the test originally enumerated in *Steincamp vs. Steincamp,* the satisfaction of fundamental due process requirements. It is patently unfair to permit a California court to issue what constitutes a default judgment against Barkley when there is no evidence whatsoever to establish that he received the service of process papers from the agent. *Steincamp* involved a contempt citation issued in 1976 for the defendant's failure to honor the terms of a divorce decree entered in 1970. A citation of contempt was served upon the defendant's attorney of record from the 1970 proceedings. The attorney filed a motion to quash service of the citation alleging that the attorney's employment terminated with the completion of the matter in 1970 and that he was no longer authorized to accept service. The defendant in *Steincamp* had actual notice of the proceeding by virtue of his special appearance to challenge sufficiency of process.

Despite the defendant's actual knowledge, the Oklahoma Supreme Court held that the notice served upon the attorney was not sufficient to satisfy due process requirements. *Steincamp,* 593 P.2d at 499. The Oklahoma Supreme Court stated:

> Appellee insists that the method of notice here employed was reasonably calculated to actually inform the appellant of the proceedings., We do not agree with this conclusion. Notice was

> served on the attorney of record six years following the termination of the attorney-client relationship. There was no communication between them during that period. Notice served on the attorney of record will satisfy due process only so long as there is a reasonable presumption that such notice will reach the former client. (*Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). We cannot indulge in such presumption here. The greater the passage of time without renewed communication the less likely will service on the attorney alone be sufficient. ***On similar facts, an Oregon court found a two year passage of time was too long to support the presumption of a continuing relationship. Miller v. Shufeldt,*** 2 Or.App. 243, 467 P.2d 971 (1970). (emphasis supplied).

Steincamp, 593 P.2d at 498.

This case provides additional support for the ruling of the Trial Court. Barkley established in the Trial Court that he had no relationship or communication whatsoever with Greg Paul, the agent appointed for service of process in the Investor Agreement, which was executed in September of 1985. More than twenty-one months had elapsed from the time the Investor Agreement was executed until the Notice and Petition were purportedly served upon Mr. Paul. As the Oklahoma Supreme Court has recognized, the greater a passage of time without communication, the less likely will service on the attorney alone be sufficient. *Steincamp* fully supports the decision of the Trial Court to vacate the foreign judgment on due process grounds.

C. The Court Has Misconstrued Szuhkent and its Progeny.

With all due respect to this Court, Barkley believes that the court has misinterpreted the holding in *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964). In *National Equipment*, the underlying contract permitted service of process to be made upon a duly appointed and authorized agent specified in the contract. The entire United States Supreme Court was fundamentally concerned that substituted methods for service of process violated due process requirements. Under the circumstances, the United States Supreme Court held that prompt acceptance and transmission of the summons and complaint by the agent where the defendant was provided actual notice was sufficient to validate the agency and permit the New York court to exercise personal jurisdiction. *National Equipment Rental*, 375 U.S. at 318, 84 S.Ct. at 416.

The United States Supreme Court expressed an apparent disapproval[1] for this kind of service method even though the record in this case was clear that the defendants had received actual notice from the designated agent and strongly suggested that if Szukhent had not received actual notice, a due process problem was inevitable.

> We need not and do not in this case reach the situation where no personal notice has been given to the defendant. Since the respondent did

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[1] The decision by the entire Supreme Court was only based upon a 5-4 majority. A strong dissenting opinion was authored by Mr. Justice Black.

> in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases *where there is no actual notice, such as . . . Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

National Equipment Rental, 375 U.S. at 315, 84 S.Ct. at 414.

The Supreme Court also suggested that a different case would have been presented had actual notice not been provided to the defendants. *National Equipment Rental*, 375 U.S. at 318, 84 S.Ct. at 415-6. Earlier, the Supreme Court noted that " . . . adequate and timely notice . . . is a prerequisite to a valid judgment." *National Equipment Rental*, 375 U.S. at 318, 84 S.Ct. at 415. Even though a party may designate a representative to accept service of process, the failure to provide actual and timely notice calls into question the validity of the judgment. *National Equipment Rental, Ltd. v. Szukhent*, only recognized the legitimacy of an agent appointed by contract because there was a demonstration of actual transmission by the agent and ***receipt*** by the defendants. *See 1 Moore's Federal Practice*, ¶4.12 n.7 (1989).

This court rejected Barkley's argument that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) was applicable to this case. In *Szuhkent*, the United States Supreme Court specifically noted the applicability of *Mullane* to circumstances identical to those which confront Barkley. Once again, the citation by the Supreme Court in *Szuhkent* to the *Mullane* decision is notable for purposes of this appeal:

> The case before us is therefore quite different from cases *where there is no actual notice, such as . . . Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865.

National Equipment Rental, 375 U.S. at 315, 84 S.Ct. at 414. (emphasis supplied).

Apparently, the United States Supreme Court believes that the receipt of service of process papers is extremely material to the establishment of in personam jurisdiction, otherwise they would not have referred directly to *Mullane*. The factual circumstances present in this action appear to be the situation the United States Supreme Court was contemplating in *Szuhkent*. However, in *Szuhkent*, and unlike this case, it was clear that the defendants had actual notice of the proceedings. The United States Supreme Court recognized in *Szuhkent* that the mere fact that service is not statutorily imposed does not limit one's right to actual notice of a judicial proceeding which is regulated by statute and subject to constitutional overview. It is clearly recognized that the agent must actually notify the defendant of the pending suit. J. Friedenthal, M. Kane, A. Miller, Civil Procedure 172 (1985).

In *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), the United States Supreme Court was asked to address the constitutionality of the notice requirements of a statute involving the tax sale of foreclosed property. In this case, state law provided for tax sales in certain circumstances and for a two year period following any such sale during which the owner or any lienholder could redeem the property. After expiration of the redemption period, the tax sale purchaser could apply for a deed. The

property owner received actual notice but all other interested parties were given notice by publication. *Mennonite Board,* 462 U.S. at 792-4. A mortgagee of the property that had been sold and on which the redemption period had run complained that the state's failure to provide it with actual notice of these proceedings violated due process. The United States Supreme Court agreed, holding that:

> ***. . . actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.***

Mennonite Board, 462 U.S. at 800. (emphasis supplied).

Once again, and contrary to the holding of this Court, the United States Supreme Court has referred to the term "actual notice" as a constitutional condition to the establishment of in personam jurisdiction for any method of service other than personal service. *Mennonite Board* unequivocally states that whether someone is commercially sophisticated or not, he/she is entitled to actual notice. Whether Barkley understood the implications of substituted service of process is totally immaterial to his right to actual notice under the principles enumerated in *Mennonite Board.*

This Court appears to be extremely critical of Barkley for his position in this litigation yet the Court did not even consider the fact that RKO never even attempted to provide Barkley notice of this matter. RKO did nothing to provide Barkley an opportunity to defend his rights even though they had been given notice that Barkley was

interested in this matter and provided RKO has whereabouts in correspondence. RKO's absolute indifference to Barkley's right to defend himself was manifested by its taking what constituted a default judgment without any evidence of communication whatsoever with Barkley. The clear trend in Oklahoma is not to permit substituted service of process methods when the name and address of a party are readily available.

D. Decisions From Other Jurisdictions Support the Right To Actual Notice.

Surprisingly, this Court did not even consider a case from a sister jurisdiction involving virtually identical circumstances to the one presently before this Court. *National Equipment Rental Ltd. v. Taylor,* 225 Kan. 58, 587 P.2d 870 (1978). National Equipment Rental brought an action in the Kansas court to enforce a foreign judgment obtained against Taylor. The lease agreement between National Equipment Rental and Taylor contained a provision that only courts in New York would have jurisdiction over any dispute and that Taylor waived personal service of any and all process and consented that any service could be made by certified mail, return receipt requested.

The Kansas court recognized that foreign judgments were normally accorded full faith and credit by its courts. Nonetheless, the Kansas court made an independent inquiry into the sister state's jurisdiction over Taylor. *National Equipment Rental,* 587 P.2d at 872.

The issue for determination by the Kansas court was whether the New York court properly acquired personal

jurisdiction over Taylor. The Kansas court found as a matter of law that Taylor waived personal service and consented to substituted service by certified mail, return receipt requested. Importantly, *the Kansas court noted that Taylor did not waive the right to actual notice of any pending proceeding pursuant to the terms of the lease agreement.* (emphasis supplied). There was no evidence whatsoever that Taylor had received actual notice of the New York proceeding. Since it had not provided actual notice, National Equipment Rental argued that service was complete upon mailing the summons and complaint. This rather absurd contention was summarily rejected by the Kansas court which held that the New York court never obtained jurisdiction over Taylor and National Equipment Rental's judgment was void and not entitled to full faith and credit. 587 P.2d at 873.

Contrary to the fundamental due process principles established by the United States Supreme Court in its interpretation of the Constitution and the persuasive authority of the Kansas Supreme Court, this Court found that service upon Barkley was complete upon the mere delivery of the Notice and Petition to Barkley's agent. This holding is without validity as Barkley never waived his right to actual notice in the Investor Agreement.

III.

CONCLUSION

Hopefully, this Court will appreciate and be persuaded to grant a rehearing to avoid a truly unjust result and correct a significant decision before it is unfairly applied against Barkley. The validity, correctness and

adequacy of the precedent relied upon in this case is of enormous precedential value and of important public interest. Further reflection on this decision may ultimately save the Court significant time and effort in the future should this decision be utilized as the seminal decision in the area of due process. The Petition for Rehearing affords the Court an additional opportunity to consider the far reaching ramifications of this decision. The future implications of this case in the litigation setting are enormous. Despite this Court's great burden of other cases to review, it is respectfully hoped that the Court will reexamine a decision which so greatly impacts the right to due process in this State. The fundamental flaws in the ruling cannot be ignored.

For all of the above reasons, Petitioner/Appellee Mike Barkley respectfully requests that this Court reconsider its previous opinion and restore the judgment of the Trial Court.

Respectfully submitted,

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CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the above pleading was mailed with proper postage, on the 13th day of March 1992, to Thomas A. Mann, Attorney at Law, 3314 East 51st Street, Suite 218MM, Tulsa, Oklahoma 74135, and to George S. Thompson, NICHOLS, WOLFE, STAMPER, McNALLY & FALLIS, Suite 400, 124 East 4th Street, Tulsa, Oklahoma 74103.

/s/ John D. Clayman

APPENDIX K

NO. 75,649

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA
DIVISION 3

RKO PICTURES, INC.

Appellant

v.

MICHAEL BARKLEY and TIM HAYES

APPELLEES

ON APPEAL FROM DECISION OF
HONORABLE DONALD C. LANE, JUDGE

DISTRICT COURT IN AND FOR TULSA COUNTY
NO. CJ-88-3802

ACTION FOR VACATION OF FOREIGN JUDGMENT

APPELLEE'S, TIM HAYES, PETITION FOR REHEARING AND SUPPORTING BRIEF

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Appellee, Tim Hayes ("Hayes"), pursuant to Rule 3.9 of the Rules of Practice and Procedure in the Court of Appeals, petitions this Court to set aside its decision rendered on the 25th of February, 1992, and grant a rehearing.

STATEMENT OF THE CASE

In its opinion of February 25 the Court reversed the order of the trial court granting Hayes's Motion to Vacate RKO's California judgment against him. The Court based its reversal on its finding that Hayes should be bound by a California judgment even though Hayes had no actual notice of that judgment and was never given an opportunity to be heard or defend against that judgment.

ARGUMENT

The Full Faith and Credit clause does not require Oklahoma courts to recognize foreign judgments where such judgments were rendered without jurisdiction over the parties. U.S.C.A.Const. Art. 4 § 1; *Pettit v. American National Bank of Austin*, 649 P.2d 525, 527 (Okla. 1982); *Britton v. Gannon*, 285 P.3d 407 (Okla. 1955), cert. den. 350 U.S. 886, 76 S.Ct. 140, 100 L.Ed. 781. In any adjudicative proceeding, notice and the opportunity to appear are fundamental to the establishment of jurisdiction over a party. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 70 S.Ct. 652, 657 (1950). If a foreign judgment is rendered without jurisdiction over or due process for a party, the Oklahoma Courts may not accord that foreign judgment full faith and credit. *Pettit*, 649 P.2d, at 527.

I.

A REHEARING SHOULD BE GRANTED BECAUSE THE COURT'S ESTABLISHMENT OF JURISDICTION IN RELIANCE ON *GREEN MOUNTAIN COLLEGE v. LEVINE* IS CONTRARY TO ESTABLISHED CALIFORNIA LAW.

Issues concerning the validity of a foreign courts judgment must be tested by the law of the jurisdiction where that judgment was issued. *Petti v. American National Bank of Austin*, 649 P.2d 525, 527 (Okla. 1982). Judgment against Hayes was issued in the Superior Court of the State of California for the County of Los Angeles. Therefore, in determining the validity of the California judgment upon which appellants rely, this Court must look to California laws.

In overturning the Trial Court's Order vacating RKO's California judgment against Hayes, this Court stated:

> Whether . . . Hayes actually received the Notice and Summons is immaterial.
>
> * * *
>
> Under the California Code of Civil Procedure, § 416,90, service was "accomplished and completed" when Paul received Notice and Summons from RKO. This ends the inquiry.

In finding that Hayes's service was complete, the Court adopted the rational of *Green Mountain College v. Levine*, 139 A.2d 822 (Vt. 1958). *Green Mountain College* held that an individual who appointed an agent assumed the danger that the agent may not forward the notice to the individual.

The rational and holding of *Green Mountain College* is contrary to well established California law. Under the California Code of Civil Procedure § 473.5:

> (a) When service of a summons has not resulted in *actual notice* to a party in time to defend the action and a default or default judgment has been entered against him or her in the action, he or she may serve and file a motion to set aside the default. . . .

California Code of Civil Procedure § 473.5 (emphasis added).

Under § 473.5, even though a plaintiff may have succeeded in *serving* a party to a proceeding (such as an appointed agent), when the service has not given the defendant *actual notice* in time to present a defense, then the defendant may make a motion to set aside the default judgment. California Code of Civil Procedure § 473.5. Thus, where Hayes's appointed agent failed to provide *actual notice* to Hayes of a California proceeding, Hayes may set aside a default judgment filed against him.

The California Courts construed § 473.5 in the case of *Rosenthal v. Garner,* 142 Cal.App.3d 891, 191 Cal.Rptr 300 (1983). In *Rosenthal,* the plaintiff served the attorney for the defendant with the summons and notice. The attorney failed to notify the defendant of the proceeding. A default judgment was taken against the defendant. Upon receiving notice of the default judgment, the defendant, through the attorney who had failed to give the defendant the notice and summons, brought a motion to vacate the default judgment under § 473.5. The defendant claimed that he had no actual notice of the proceeding in

time to appear and defend. *Rosenthal,* 191 Cal.Rptr, at 893-895.

The *Rosenthal* court found that § 473.5 demands that the defendant have actual notice of the proceedings. *Rosenthal,* 191 Cal.Rptr, at 895. Defining "actual notice", the court stated:

> '[A]ctual notice' means genuine knowledge of the party litigant and does not contemplate notice imputed to a principal from an [agent's] actual notice.

Rosenthal, 191 Cal.Rptr, at 895. Subsequent California decisions have followed the strict construction of "actual notice" to the litigant with the aim of implementing the policy of liberally granting relief so that cases may be resolved on their merits. *Olvera v. Olvera,* 232 Cal.App.3d 32, 283 Cal.Rptr. 271 (1991) (Wherein it was held that if the court has acquired jurisdiction, i.e., summons has been served, but service of summons has not resulted in actual notice to a defendant, then the defendant may seek relief under section 473.5)

As the record clearly shows, Hayes did not receive actual notice of the proceedings in California in time to appear and defined. As a result of the lack of notice to Hayes, default judgment was issued by the California Court. Hayes first notice of the proceedings occurred when the appellants's sought to enforce the California default judgment in the Oklahoma Courts. Hayes responded promptly by filing a motion to vacate the judgment for the reason that he did not receive "acutal

notice" in time to defend the suit. The Trial Court affirmatively found that in fact, Hayes had not received the requisite notice.

Since Hayes, never received "actual notice", as required under the California Code of Civil Procedure § 473.5, the Order of the Trial Court Vacating Foreign Judgment must be reinstated and the default judgment against Hayes must be vacated.

II.

A REHEARING SHOULD BE GRANTED BECAUSE THE COURT MISCONSTRUED THE DUE PROCESS REQUIREMENTS THAT MUST BE ACCORDED TO HAYES.

As set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, (1950), "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane*, 70 S.Ct., at 657; *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914).

> This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
>
> * * *
>
> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane, 70 S.Ct., at 657.

As the Oklahoma Supreme Court has repeatedly held, the very basis underlying due process is the requirement that life, liberty or property not be deprived by adjudication unless preceded by notice and an opportunity for a hearing appropriate to the nature of the action. *Capital Federal Savings Bank v. Bewley,* 795 P.2d 1051, 1053 (Okla. 1990) (citations omitted). Paralleling the language of *Mullane,* the Oklahoma Supreme Court finds that the opportunity to be heard:

> . . . is wholly worthless without notification of the occasion requiring it to the person whose rights are affected so that he may decide for himself whether to appear or default.

Bewley, 795 P.2d at 1053 (citations omitted).

Hayes admits that the rule is well-settled that parties to a contract may agree to the manner in which service of process is delivered by the opposing party. *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964). However, it is also well settled that a party who selects an agent for service does not waive his right to due process under the law. In *National Equipment Rental,* above, two Michigan Farmers agreed to have Service made on a New York Agent. The Supreme Court held that prompt acceptance and transmission of the summons and complaint by the agent to the Michigan Farmers was sufficient to validate the agency and permit the New York Court to exercise personal jurisdiction.

Because the Michigan Farmers received "actual notice", the United Sates Supreme Court stated:

> We need not and do not in this case reach the situation where no personal notice has been

> given to the defendant. Since the respondents did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made. The case before us is therefore quite different from cases where there was no actual notice. . . .

National Equipment Rental, 84 S.Ct., at 414. Indeed, the "quite different" case is the exact issue that appears before this Court. The clear implication of *National Equipment Rental* is that a party who selects a service agent by contract does not waive his due process rights. In fact, *National Equipment Rental* makes it clear that a question of due process will arise in those situations where the agent fails to give "actual notice" to the defendant.

In this proceeding, the Trial Court expressly found that Hayes never received notice of the adjudicative proceeding upon which the Appellant seeks to enforce their California Judgment. Hayes's lack of notice deprived him of his right to choose whether to "appear or default, acquiesce or contest" the adjudicatory proceedings in California. This deprivation of Hayes's right to due process of the law clearly demands that RKO's California Judgment against Hayes be vacated.

CONCLUSION

Hayes never received actual notice of the California proceedings. He never had the opportunity to decide whether to "appear or default, acquiesce or contest" those proceedings. Hayes's motion to Vacate the Foreign Judgment is supported by the laws of California and

those embodying Hayes's constitutional right to Due Process. Therefore this Court should vacate its decision of February 25, 1992, and grant a rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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